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Regulating the Market for Snitches

IAN WEINSTEIN†

INTRODUCTION

These are boom times for the sellers and buyers of cooperation¹ in the federal criminal justice system. While prosecutors have always welcomed the assistance of snitches, tougher federal sentencing laws have led to a significant increase in cooperation² as more defendants try

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Although I have tried to write dispassionately about cooperation here, I have also been a partisan in cooperation cases, representing more than fifty cooperators and cross examining several as an associate attorney Federal Defender Services Unit of the Legal Aid Society of New York from 1988 through 1991, and as a member of the Criminal Justice Act Panel for the Southern District of New York.

1. "Cooperation" is a term of art for the process by which a federal criminal defendant gains the possibility of sentence mitigation by providing assistance in the prosecution or investigation of others. "Snitching," "substantial assistance" and "ratting" are all synonymous with cooperation, if not quite interchangeable. The Oxford English Dictionary notes that "snitch" is slang and of obscure origin. Its first definition is "A fillip (on the nose)," the second is "The Nose" and the third is "An informer; one who turns King's or Queen's evidence." The first citation for the use of "snitch" as informer is to a 1785 dictionary entry, followed by an 1800 citation from Byron and many others. OXFORD ENGLISH DICTIONARY 858 (2d ed. 1989); see also Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 72 n.13 (1995) (associating "snitch" with the nose and so with informing).

2. I am not aware of any data on cooperation rates before the Sentencing Commission began collecting and analyzing data pursuant to its statutory directive, 28 U.S.C. § 995(12)-(16) (1994 & Supp. 1997), but the relatively sparing use of cooperation in the first years of the *Guidelines* is consistent with

to provide "substantial assistance in the investigation or prosecution of another person,"³ to have some chance of receiving a significant sentence reduction. In 1996 one of every five defendants sentenced in the federal courts won mitigation by providing substantial assistance.⁴ Many more defendants tried but failed to close the deal.

The overheated cooperation market is creating serious problems in the federal criminal justice system. Cooperation is unevenly distributed and subject to wide variations in local practices and policies. While one defendant may receive a very significant sentence reduction for a given kind of assistance to the government, another may receive no reward for the same efforts. The system is rife with individual and district-to-district disparities, a problematic situation in a sentencing regime that values uniform sentencing above all else.⁵ The excessive use of cooperation also damages the adversary system by putting too many defendants on the government's team and making the defense lawyer little more than a passive observer of his or her client's case.⁶ Finally, widespread cooperation is ethi-

the sense of experienced practitioners that cooperation was not as widespread before the *Guidelines* as it is now. In 1989, the first year data was available, only 3.5% of the cases involved substantial assistance departures. In 1990 the number climbed to 7.5%, and continued to move up to 11.9% in 1991, 15.1% in 1992 and 16.9% in 1993. In 1994 the figure reached 19.5% and has remained at about that level, 19.7% in 1995 and 19.2% in 1996. See UNITED STATES SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 39 fig.G (1996) [hereinafter 1996 FED. SENT. SRCBK.]. This information is also available at the *United States Sentencing Commission Homepage* (Jan. 30, 1999) <<http://www.ussc.gov>> (on file with author and the *Buffalo Law Review*). A federal judge and former federal prosecutor has pointed to these same statistics to support the view that cooperation has increased since the introduction of the *Sentencing Guidelines*. See John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 424 n.9 (1997).

3. 18 U.S.C. § 3553(e) (1994). See also U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1997) [hereinafter U.S.S.G.] (stating the policy regarding criminals who provide substantial assistance to authorities).

4. The Sentencing Commission has reported sentencing statistics on a fiscal year basis, October 1 to September 30, since 1990. See 1996 FED. SENT. SRCBK., *supra* note 2, at 39 fig.G n.1. Between October 1, 1995, and September 30, 1996, 19.2%, or 7845 of the total 40,879 criminal sentences imposed under the *Sentencing Guidelines* involved sentence mitigation (downward departures from the otherwise applicable range established by the *Sentencing Guidelines*) to reward substantial assistance. See *id.* at tbl.26.

5. For a discussion of sentencing disparities, see *infra* pp. 601-17.

6. For the impact of excessive cooperation on the adversary system, see *infra*

cally problematic. Because disloyalty is at the heart of cooperation, snitching engenders almost universal moral ambivalence and we should question whether the government should encourage so much of it.⁷ The current rate of cooperation is particularly troubling because a significant portion of snitching brings relatively few concomitant law enforcement benefits.⁸ The current rate of cooperation is unjustifiable.

Unfortunately, cooperation will remain excessive until the incentives for its use are reduced. Those who make the day-to-day decisions to buy and sell cooperation gain many benefits from the practice and are largely unaffected by the systemic problems of inequity, damage to the adversary system and the moral ambivalence surrounding snitching. The current market for snitches cannot optimize the use of cooperation because these decision-makers internalize the benefits and externalize (and so largely ignore) the costs.

The problem of externalized costs in the criminal justice system is not unique to cooperation.⁹ It is part of the story of the ascendancy of the plea bargain and its centrality in the American criminal justice system. Docket congestion and other systemic pressures on prosecutors, defendants and defense lawyers have long meant that most criminal cases in America are resolved by negotiated plea agreements, not by trial, despite persistent questions about the

pp. 617-22.

7. For discussion of our strong moral ambivalence about snitching, see *infra* pp. 622-25.

8. For discussion of why some cooperation may not have significant law enforcement value, see *infra* pp. 613-14.

9. The problem of the externalization of the costs of prosecution are discussed by Robert L. Misner, along with his proposal for a market incentive based approach to regulating discretion. See Robert L. Misner, *Criminal Law: Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 766-71 (1996) (urging tying prosecutorial discretion to the availability of prison resources to internalize costs and provide an incentive to maximize strategic law enforcement planning). Two classic examples of economic analysis of discretion in the criminal justice system are Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 290 (1983) (discussing the incentives favoring plea bargaining and arguing that prosecutorial discretion is an efficient and fair regulator) and Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988) (explaining that prosecutorial discretion in charging, bargaining and sentencing does not lead to the most efficient results because of problems of public management; even if it were most efficient, fairness concerns would still justify some controls on discretion).

practice.¹⁰ For example, 90.4% of all federal criminal cases in 1996 were resolved with pleas of guilty and only 9.6% of the cases went to trial.¹¹ Defendants are usually induced to plead guilty by the promise of sentence mitigation in return for waiving their right to trial.¹² Prosecutors enter into plea

10. One general argument is that prosecutors find the immediate benefits of plea bargaining so attractive that they overshadow relatively weak concerns about its systemic costs. See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992) (providing an example of one of the most insightful and persistent criticisms of plea bargaining, arguing for the elimination of plea bargaining). For discussions of pre-*Guidelines* plea bargaining, see generally Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981) (criticizing plea bargaining as irrational, unfair and reaching results unrelated to the proper objectives of criminal prosecution) and PAMELA J. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* (1978) (defending plea bargaining).

11. A total of 60,255 defendants were "disposed of" in the federal courts in 1996. Dismissals accounted for 7,083 of those defendants. Of the remaining 53,172 defendants, 4976 (9.4% of the defendants whose cases were not dismissed) went to trial. Of those 4976 defendants who went to trial, 902 (18% of all defendants who went to trial) were acquitted and 4074 (82% of all defendants who went to trial) were convicted. The remaining 48,196 (90.6% of the defendants whose cases were not dismissed) entered pleas of guilty or nolo contendere. BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 448 tbl.5.27 (1996) [hereinafter BUREAU OF JUSTICE SRCBK.]. The rate of trials in the state courts appears similar, with an average plea rate of 89% reported for felony convictions in state courts in 1994. *Id.* at 471 tbl.5.52.

12. See, e.g., *Santobello v. New York*, 404 U.S. 257, 261-62 (1971) (taking the inducement to plead as a given in holding that plea agreements are enforceable). That inducement, in the form of sentence mitigation, has been formalized in the *Sentencing Guidelines* system. See U.S.S.G. § 3E1.1. The *Guidelines* permit the judge to reduce a defendant's "offense level" by two or three points, depending on the severity of the offense level and the judge's evaluation of the degree of the acceptance of responsibility. The maximum of the range at a given offense level exceeds the minimum by six months or 25%, whichever is greater. The maximum of the range of each offense level (above level 12) is the mid-point of the next higher offense level range and the minimum of the range two levels higher. Thus, a two point reduction makes what was formerly the minimum sentence now the maximum sentence, while a three point reduction puts the maximum about 14% lower than the former minimum. The overall inducement can be as low as no mitigation (the judge can impose the same sentence as the maximum after plea as could have been imposed as the minimum after trial, assuming a two point reduction) to an almost 40% reduction in sentence, comparing the high end of the range at the unreduced offense level with the low end of the range three offense levels lower. Defendants may even receive modest relief from statutorily mandated mandatory minimum sentences for drug offenses if they agree to plead guilty, disclose their criminal activities, are first time offenders and meet certain other requirements. This safety valve provision is codified at 18 U.S.C. § 3553(f) (Supp. 1997). See Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the*

agreements for a number of reasons, but chiefly because they are efficient and virtually risk free.

In one light cooperation agreements may be seen as simply a subset of plea agreements. Cooperation agreements are a particularly attractive kind of plea agreement but their relatively greater attractiveness does not, by itself, justify addressing cooperation separately from other plea bargains. After all, a decrease in cooperation would not decrease overall plea bargaining—it would just change the deals. It is important, however, to view the problem in another light and see the unique problems associated with cooperation, in addition to those of ordinary plea bargains. Those difficulties justify reforming the current market for cooperation and driving some defendants and prosecutors away from cooperation and back to standard plea agreements. The challenge is finding a way to achieve an optimal reduction in cooperation, while at the same time maximizing its law enforcement benefits and minimizing its inequities and other costs.

The difficulties in finding the right mechanism stem primarily from cooperation's role as one of the decisions about allocating law enforcement resources and framing charges that our system commits to prosecutorial discretion.¹³ Direct regulation of prosecutorial discretion¹⁴ is

Safety Valve, and the Sentencing Guidelines, 63 U. CIN. L. REV. 1851, 1883 (1995) for a discussion of the safety valve provision.

13. The Supreme Court has noted on many occasions that charging decisions are within the:

"special province" of the Executive. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The Attorney General and United States Attorneys retain "broad discretion" to enforce the Nation's criminal laws. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380, n.11 (1982)). They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3; see 28 U.S.C. §§ 516, 547. As a result, "[t]he presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

United States v. Armstrong, 517 U.S. 456, 464 (1996) (holding that discovery on

inherently problematic. After all, one reason we rely upon the prosecutor's discretion is because each decision requires expert balancing of situation specific facts and circumstances. Cooperation, however, is a uniquely powerful and problematic prosecutorial weapon whose current overuse demands that we find a way to control this exercise of discretion.

This Article argues for an unusual solution to meet this particular problem—the imposition of a numerical limit on the number of defendants who may be rewarded with sentence mitigation in order to impose a cost on prosecutors to encourage them to use fewer cooperators. Once prosecutors begin to pay a price for snitches they will be more careful about what they get in return, maximizing the law enforcement value of those they do use. While it is true that we do not usually restrict prosecutors' use of particular investigative tools, more traditional approaches to this problem, such as direct regulation of prosecutorial discretion¹⁵ or reducing defendants' incentives to cooperate¹⁶ will either prove ineffective or lead to reduced but suboptimal use of cooperators. Raising the cost of cooperation to the prosecutors by limiting the number of snitches they may reward is the only way to decrease snitching overall while maximizing its law enforcement benefits.¹⁷

a selective prosecution claim is only required after a threshold showing that others of a different race who were otherwise similarly situated were not prosecuted).

14. The sentencing reforms of the 1980s have increased the relative importance of prosecutorial discretion. Although those changes have reduced discretion generally, they have much more significantly reduced judicial sentencing discretion, leaving prosecutors with a greater degree of control over sentencing than they enjoyed under the old law. See Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199 (1997); Misner, *supra* note 9, at 719. See generally Cynthia Kwei Young Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994) (arguing that a prosecutor's discretion over sentencing issues is not related to discretion regarding bargaining or charging). Others have argued that power has shifted to Congress. See James B. Burns et al., *We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)*, 91 NW. U. L. REV. 1317 (1997).

15. For problems with direct regulation of prosecutorial discretion, see *infra* pp. 626-29.

16. For a discussion of lowering defendants' incentives, see *infra* pp. 629-31.

17. For an evaluation of measures to limit the demand for cooperators, see

This Article begins with an analysis of supply and demand in the cooperation market and explains why individual actors on both sides see many benefits and few costs in the practice. The next section discusses the systemic externalized costs in sentencing inequity, damage to the adversarial system and government encouragement of morally questionable behavior. The third section evaluates the potential solutions in the light of those problems and articulates the argument for a limitation on the number of snitches prosecutors may reward.

I. THE "SEEMINGLY INEXHAUSTIBLE SUPPLY"¹⁸ OF SNITCHES

A. *The Legislative Incentives*

Rewarding defendants who assist law enforcement has deep roots in Anglo-American law. In the days before organized police agencies, accomplice testimony was even more valuable than it is today and was rewarded with the extraordinary benefits of immunity from prosecution or executive clemency.¹⁹ With the development of more systematic approaches to crime control²⁰ came the formal sanctioning and expansion of negotiated agreements between prosecutors and cooperators. The traditional rewards of clemency or immunity²¹ have largely been replaced by pleas to less serious charges and other mechanisms for sentence miti-

infra pp. 630-32.

18. Gleeson, *supra* note 2, at 424.

19. See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 8-14 (1992) (tracing the history of inducements to snitching); *The Whiskey Cases*, 99 U.S. 594 (1878) (discussing historical and late nineteenth century practices and holding that a defendant could not plead compulsion to testify against an accomplice as a formal bar to prosecution but could delay trial and apply for executive clemency to which he had equitable title).

20. For the history of the development of the professional prosecutor in America, see Misner, *supra* note 9, at 728-31.

21. This Article does not discuss the use of immunity agreements, requests for which peaked in 1986 at 2550 and have fallen somewhat steadily to 1493 in 1996. See BUREAU OF JUSTICE SRCBK., *supra* note 11, at 418 tbl.5.1. Although they are fairly viewed as the "extreme variant" of the cooperation agreements discussed here, Richman, *supra* note 1, at 151 n.14, they involve the dynamic of witness and prosecutor—a very different relationship from that of defendant and prosecutor, particularly when the prosecutor has power over sentence mitigation.

gation.²²

Over the last ten years this trend has accelerated and crystallized as changes in federal law have formalized specific and powerful cooperation incentives. These changes began with the Sentencing Reform Act of 1984 (SRA),²³ which created the Sentencing Commission and directed that body to draft the *Sentencing Guidelines* (the *Guidelines*).²⁴ The *Guidelines* replaced a system of judicially determined discretionary sentencing²⁵ with a system of mandatory sen-

22. See generally Hughes, *supra* note 19, at 10-13 (discussing the development of modern practices and the importance of the sanctioning of plea bargaining in *Santobello v. New York*, 404 U.S. 257 (1971)).

23. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586, and at 28 U.S.C. §§ 991-998 (1994 & Supp. 1996)).

24. The statutory directive to draft the *Guidelines* is codified at 28 U.S.C. § 994 (1994 & West Supp. 1998). Much has been written about the impact and wisdom of the *Guidelines*. See generally THOMAS W. HUTCHISON ET AL., *FEDERAL SENTENCING LAW AND PRACTICE* (1994); PHYLLIS SKLOOT BAMBERGER, *PRACTICE UNDER THE FEDERAL GUIDELINES* (1993); HARRY I. SUBIN ET AL., *THE CRIMINAL PROCESS: PROSECUTION AND DEFENSE FUNCTIONS*, § 10, at 131-61 (1992). Academic debate has raged about the fairness of the *Guidelines* system. Compare Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991) (analyzing the conflicting provisions and arguing for more individualization), Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992) (analyzing the conflicting provisions and arguing for greater judicial power to individualize), and Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992) (calling for more individualization within the *Guidelines* system); with Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679 (defending the *Guidelines*), and Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 (1997) (defending the fundamental choice of modified, as opposed to pure charged offense sentencing, as necessary to impose sentences meaningfully related to the underlying wrongful conduct).

25. See Ian Weinstein, *Judicial Discretion and the Federal Sentencing Guidelines*, 79 B.U. L. Rev. (forthcoming Spring 1999) (manuscript on file with author and the *Buffalo Law Review*) (describing old law discretionary sentencing). Criticism of unfettered judicial discretion was central to the demise of that system. A federal judge was the most influential critic of unfettered judicial sentencing. See generally MARVIN E. FRANKEL, *CRIMINAL SENTENCES* (1973).

26. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 268 (1993) (describing the battle between those who successfully advocated mandatory *Guidelines* and those who would have let judges retain greater discretion).

tencing ranges for every offender. The SRA marked a sea of change in federal criminal sentencing but its impact was slow to be felt.²⁷

The mid-1980s push to get tough on crime could not await the development of systemic reform. In 1986 Congress passed the Anti-Drug Abuse Act of 1986.²⁸ The Act's provisions included statutory mandatory minimum penalties for those who trafficked in, imported or possessed specified amounts of particular narcotics.²⁹ Although the

27. Sentences are now longer but it took time for this major reform to take effect. See Bowman, *supra* note 24, at 732 n.186 (explaining that sentences are longer under the *Guidelines*); Stith & Koh, *supra* note 26 (describing how the Commission exercised the discretion conferred upon it to increase the severity of sentences); David Yellen, *What Juvenile Court Abolitionists Can Learn from the Failures of Sentencing Reform*, 1996 WIS. L. REV. 577, 585-90 (using the development of the federal *Guidelines* to illustrate how sentencing reform politics inevitably lead to harsher punishments). The *Guidelines* had to be drafted, take effect and withstand challenge before they governed federal sentencing. See *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding the constitutionality of the *Sentencing Guidelines*).

28. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended 21 U.S.C. §§ 841-848 (1994 & West Supp. 1998)).

29. The most important mandatory minimum sentence provisions are codified at 21 U.S.C. §§ 841, 844, 860 (1994 & West Supp. 1998) and 18 U.S.C. § 924(c) (1994 & West Supp. 1998). There are mandatory minimum sentences for offenses other than narcotics sentences but as the Sentencing Commission noted in 1991, of the 60 mandatory minimum statutes then on the books, the four relating to particular instances of narcotics trafficking, importation and possession and weapons offenses committed in the course of another crime accounted for the vast bulk of the convictions and sentences. UNITED STATES SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11 (1991) [hereinafter MANDATORY MINIMUM PENALTIES] (indicating that four statutes, setting mandatory minimum penalties for certain drug trafficking, drug importation, drug possession and firearms offenses accounted for 94% of all statutory mandatory minimum sentences; the overall argument of this report stresses the incompatibility of mandatory minimums with the *Guidelines* system). See generally Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993) (emphasizing the legislature's ultimate responsibility for setting sentences and suggesting mechanisms for greater oversight of the Commission in place of mandatory minimums); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993) (discussing and evaluating the adoption of statutory mandatory minimum sentences in both the state and federal systems); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993) (arguing that although mandatory minimums meet some of their goals, those goals can be achieved by other means that avoid the irrefutable ill effects

Guidelines have impacted every federal criminal sentence and have thus had greater long-term impact, the mandatory minimum narcotics sentences in the 1986 law were an important turning point in federal sentencing. At a time when judges enjoyed great discretion in criminal sentencing and had statutory authority to suspend almost all sentences,³⁰ the reintroduction³¹ of five, ten and twenty year mandatory minimum sentences³² was a significant change.³³

of the statutory minimums).

30. At the time the Anti-Drug Abuse Act of 1986 was passed, this statutory language gave judges the discretion to impose a sentence of no incarceration in most cases:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

18 U.S.C. § 3651 (1982), *repealed by Sentencing Reform Act of 1984*, Pub. L. No. 98-473, Title II, § 212(a) (2), 98 Stat. 1987 (applying to offenses committed prior to Nov. 1, 1987).

31. The Narcotics Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 651 (1956), included mandatory minimum sentences of five to thirty years for a variety of narcotics offenses, which were virtually all repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970). For a discussion of the history of mandatory minimums from 1790 through 1990, see MANDATORY MINIMUM PENALTIES, *supra* note 29, at 6-12.

32. The five and ten year mandatory sentences of 21 U.S.C. § 841 are keyed to the weight of a "mixture or substance containing a detectable amount" of a controlled substance. *Chapman v. United States*, 500 U.S. 453, 457 (1991) (holding that the statute requires that the weight of the carrier medium be included in determining the applicability of the statutory mandatory minimum for trafficking in LSD). The twenty year mandatory sentence applies to individuals convicted of offenses involving the required quantity of drugs who have also been previously convicted of a narcotics offense.

33. It was also an unwise change according to many. The Sentencing Commission and many commentators have argued that statutory mandatory minimums have no role in a comprehensive sentencing scheme and introduce anomalous results. *See generally* Lowenthal, *supra* note 29 (discussing conflicts between determinate sentencing schemes and mandatory minimums); MANDATORY MINIMUM PENALTIES, *supra* note 29 (noting conflicts between the *Guidelines* and mandatory minimums). Others have argued that mandatory minimums are not cost effective. *See generally* JONATHAN P. CAULKINS ET AL., RAND DRUG POLICY RESEARCH CENTER, MANDATORY DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY (1997) (providing an empirical analysis of costs and benefits of mandatory minimums). Some of the worst effects of the mandatory minimums have been addressed, albeit rather weakly, by the safety valve provision, 18 U.S.C. § 3553(f) (1994 & West Supp. 1997),

In addition to the statutory mandatory minimum provisions, the Anti-Drug Abuse Act of 1986 included two amendments which received little comment at the time,³⁴ but created the boom market in cooperation. One provision gave judges authority to sentence below a statutory mandatory minimum to reflect a defendant's cooperation, upon motion of the government.³⁵ The other amended the statutory directive of the SRA to include the direction that the Sentencing Commission "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance"³⁶ Each provision provides strong incentives to reach cooperation agreements by holding out the potential for sentence mitigation.

Statutory mandatory minimums are, as the name suggests, statutory provisions that require judges to impose not less than the specified sentence upon conviction. Typically the statutes permit harsher but not lesser sentences.³⁷ Once

permitting sentences below the mandatory minimums for some first offenders. See generally Oliss, *supra* note 12, at 1892 (calling the provision a small first step).

Mandatory sentencing provisions have proliferated despite those criticisms. See Ronald Weich, *The Battle Against Mandatory Minimums: A Report from the Front Lines*, 9 FED. SENTENCING REP. 94 (1996) (chief counsel to Senator Kennedy writing on the difficulties of opposing mandatory minimum sentence provisions during the 104th Congress, which passed immigration and child pornography bills including mandatory minimums but did not approve proposed end of term legislation including higher mandatory minimum sentences for methamphetamine and new mandatory minimums for Rohyphynol (the "date rape" drug)).

34. The statutes which fostered widespread cooperation, Pub. L. No. 99-570, §§ 1007, 1008, 100 Stat. 3207 (1986), were passed as a pair of amendments buried deep in the Anti-Drug Abuse Act of 1986. There was no debate in either chamber and no mention of the change appears in any of the reports or other legislative history of that act, save a brief comment on the floor by Senator Dole, 132 CONG. REC. 31,409 (1986); see also *United States v. Severich*, 676 F. Supp 1209, 1212 (S.D. Fla. 1988) (stating that the "legislative history appears silent as to any appropriate and articulated rationale for the substantial assistance feature.").

35. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1007, codified at 18 U.S.C. § 3553(e) (1994).

36. 28 U.S.C. § 994(n) (1994 & West Supp 1998).

37. 18 U.S.C. § 924(c) (1994 & West Supp. 1998) offers a counter example in its requirement that a defendant convicted of using or carrying a firearm during or in relation to any crime of violence or drug trafficking be sentenced to a five year term of imprisonment, not more or less, to run consecutive to any other sentence imposed.

a defendant has been convicted of an offense carrying a statutory mandatory minimum sentence, there are only two ways the judge can mitigate his or her punishment. If the defendant is a first offender, and meets other conditions, he or she may be eligible for a modest sentence reduction through the "safety valve" provision.³⁸ If the defendant does not meet those conditions, or seeks the possibility of a greater sentence reduction, cooperation offers the only mechanism. The incentive to cooperate created by the provision permitting sentences below the statutory mandatory minimum is quite straightforward.

The incentive that flows from the relevant Guideline provision, *United States Sentencing Guidelines Manual* § 5K1.1, Substantial Assistance to Authorities, is also strong, but a bit more complicated.³⁹ The provision is one piece of an overall scheme that standardizes sentencing by imposing a range,⁴⁰ expressed as a minimum and maximum number of months, within which the defendant must be sentenced unless the judge finds a legal basis for going outside, or in *Guidelines* terminology "departing" from the range.⁴¹

38. See *id.* § 3553(f); *supra* note 12 (discussing the "safety valve" provision).

39. The overall complexity of the *Guidelines* has been a subject of particularly interesting and insightful criticism. Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441 (1997) (arguing that the complexity and rigidity of the *Guidelines* have led the courts to take a high enforcement/low judicial creativity approach to sentencing); Kate Stith & Jose Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1281 (1997) (criticizing the Commission's efforts to "micro-manage" sentencing).

40. The guideline range is determined by finding the defendant's place on the Sentencing Table, a matrix defined by a vertical axis determined by rules keyed to the severity of the defendant's conduct and a horizontal axis determined by prior criminal record. Each box in the matrix is assigned a sentencing range, expressed as a minimum and maximum number of months within which the defendant must be sentenced. See U.S.S.G., *supra* note 3, at § 5A Sentencing tbl.

41. Judges may depart downward from the range, mitigating the sentence, or they may depart upward, making the sentence harsher. See U.S.S.G., *supra* note 3, at § 1A4(b). Departures must be distinguished from adjustments; adjustments are factors related to the crime or the criminal which raise or lower the offense level within the *Guidelines* scheme, while departures are factors created by the Commission to take the case outside the *Guidelines* scheme all together. *Id.* at § 3. The *Guidelines* separate departure factors into three categories: those that judges are encouraged to use, those that they are discouraged from using and those that they are forbidden from using. See *id.* at § 1A4(b); see also *Koon v. United States*, 518 U.S. 81, 116 (1996) (discussing the

The *Guidelines* have made sentences both more severe and predictable.⁴² There is now a certain—and for many an all too minor—sentencing difference between an ordinary plea agreement and a trial.⁴³ Consider the actual choice between a sentence of 120 to 135 months after a plea and a

roles of forbidden, encouraged, discouraged and unmentioned departure factors and holding that abuse of discretion is the proper standard of review of district decisions to depart). Forbidden factors such as race, sex, national origin, creed, religion and socio-economic status may never be the basis for a departure. See U.S.S.G., *supra* note 3, at § 5H.10. Others are encouraged, such as upward departures in cases where the defendant's criminal history category does not adequately reflect the seriousness of his or her past conduct. See *id.* at § 4A1.3. Discouraged factors, such as age, education, mental and emotional conditions, physical condition, employment record, family ties and responsibilities, military, civic, charitable or public service and lack of guidance as a youth are not "ordinarily relevant" to determining the sentence but may be considered if the situation is not ordinary. See *id.* at §§ 5H1.1-1.6, 1.11-12. This set of factors has spawned much litigation, with disparate results. Compare *United States v. Galante*, 111 F.3d 1029 (2d Cir. 1997) (affirming departure based on discouraged factor of family circumstances), with *United States v. Wilson*, 114 F.3d 429 (4th Cir. 1997) (reversing departure based on family circumstances). See generally Weinstein, *supra* note 25 (manuscript at 49-79) (comparing differing circuit court approaches to departures after *Koon*, 518 U.S. at 81). Departures based upon factors not mentioned in the *Guidelines* must be considered on a case-by-case basis and cannot be categorically excluded. See *Koon*, 518 U.S. at 108.

42. Under the *Guidelines*, defense lawyers are able to make much more accurate sentence predictions much earlier in the case than they could in the era of discretionary sentencing. This has a significant impact on defendants' decision making. Under the old system, defendants could make their decisions with the hope of a lenient sentence and a lawyer could not tell them such a sentence was legally impossible. No matter how bad the odds, in a discretionary regime there is always a chance. That is no longer the case. Defendants facing the *Guidelines* or a statutory mandatory minimum cannot even gamble on leniency. The role of greater predictability in shaping the decision making of defendants, who must make very important decisions under very difficult circumstances, is probably quite significant, although its effects may be hard to separate out from the impact of longer sentences.

43. Despite predictions that the *Guidelines* would result in more trials, that does not seem to be the case. Although trial rates increased in the first three years, they have since retreated. Two data sets show the same trend. The Commission collects data for the mode of conviction, a number that does not account for acquittals. By that measure, the rate of trial was 11.9% in 1989, 12.3% in 1990, 14.6% in 1991, 13.0% in 1992, 11.5% in 1993, 9.5% in 1994, 8.1% in 1995 and 8.3% in 1996. 1996 FED. SENT. SRCBK., *supra* note 2, at 15 fig. C. Using the numbers from *Defendants Disposed of in U.S. District Courts*, in BUREAU OF JUSTICE SRCBK., *supra* note 11, at 448 tbl.5.27, the rate of trial among all defendants whose cases were not dismissed was: 16% in 1989, 16% in 1990, 15% in 1991, 14% in 1992, 12% in 1993, 11% in 1994, 10% in 1995 and 9% in 1996.

sentence of 151 to 188 months following conviction after trial.⁴⁴ Assuming that this defendant faces a high probability of conviction, his or her best case scenario is the daunting prospect of spending about 102 months in prison, after credit for good behavior.⁴⁵ Although the best case after trial will involve an additional two years in prison,⁴⁶ the marginal benefit is dwarfed by what many defendants perceive to be a very long prison sentence in either case. Thus, virtually all defendants are keenly interested in downward departures, the primary formal mechanism of sentence mitigation under the *Guidelines*.⁴⁷

44. See U.S.S.G., *supra* note 3, at § 5A Sentencing tbl. These ranges are for a hypothetical defendant facing narcotics trafficking charges involving one kilogram of heroin or five kilograms of cocaine or fifty grams of cocaine base who had two prior non-drug convictions. Assuming no adjustments, that defendant would be at offense level 32, criminal history category III, upon conviction after trial for a sentencing range of 151-88 months. Assuming that he or she received the three point downward adjustment for acceptance of responsibility, § 3E1.1(b), the sentence would be at level 29, criminal history category III, and ten year mandatory minimum would determine the bottom of the sentencing range, which would be 120-35 months.

45. The reduction from the ten year mandatory minimum reflects sentence credit for good behavior. Federal prisoners serving sentences longer than one year, but less than life (including those serving statutory mandatory minimum sentences) can receive 54 days of "good time" credit on any sentence longer than one year. See 18 U.S.C. § 3624(b) (1994 & West Supp. 1998).

46. This figure is calculated by subtracting 15% good time credit from 151 months yielding roughly 129 months or ten years and nine months.

47. Defendants also have a strong incentive to litigate the many detailed calculations underlying the determination of the sentencing range including sentence mitigation and proper sentence calculation, depending on the underlying facts related to each case. See discussion *infra* nn.180 & 181 (outlining *Guidelines* calculations issues that are often used to manipulate sentences). For a broad historical discussion of mitigation, see generally Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925 (1960) (tracing the history of the development of the equitable powers of dispensation and mitigation and arguing for greater individualization of legal results). The other significant source of mitigation is prosecutorial charging decisions. See, e.g., Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1989) (describing prosecutorial charging practices in three districts); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284 (1997) (discussing the mechanisms prosecutors use to manipulate the *Guidelines*); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989) (comparing prosecutorial practices before and after the Mistretta decision).

Among the varied grounds for downward departures, substantial assistance stands out in two important ways. First, the government is the sole gatekeeper for cooperation departures. Although judges exercise complete control over whether to grant all other departures,⁴⁸ substantial assistance requires a motion from the government.⁴⁹ Second, substantial assistance is also far and away the most common ground for departure, with twice as many cases involving cooperation as all the other factors put together.⁵⁰ As a practical matter, cooperation is the most likely, and often the only realistic chance, a defendant has to get a sentence below the *Guideline* range.⁵¹

For those facing a statutory mandatory minimum sentence the situation looks, and is, even bleaker. Except for the relatively modest benefit available to some first time offenders through the "safety valve" provision, a government motion seeking mitigation to reward cooperation is the only path to a lower sentence. In either case, substantial assistance opens the possibility of a dramatic

48. Weinstein, *supra* note 25 (manuscript at 30-32) (explaining judicial discretion in non-substantial assistance departures).

49. The statutory and *Guidelines* requirements for a government motion in this instance as required by 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 combine to create a key element in the shift in sentencing discretion from judges to prosecutors. See Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, *supra* note 14, at 107-08; Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, *supra* note 14, at 234-38; Misner, *supra* note 9, at 757-58 n.295. There are very limited avenues for judges to recognize cooperation in the absence of a motion. See Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, *supra* note 14, at 144 n.175 (discussing cases in which judges have departed without government motion to recognize extraordinary acceptance of responsibility or to reward a defendant for encouraging another to plead and so assisting the court).

50. There were 40,879 sentences imposed under the *Guidelines* in 1996. See 1996 FED. SENT. SRCBK., *supra* note 2, at 41 tbl.26. A total of 28,445 (69.6%) of those were within the *Guidelines* range. *Id.* Of those sentences, 43.8% were within the first quarter of the range, 9.6% were in the second quarter, 3.3% were in the third quarter and 9.1% were in the fourth quarter. See 1996 FED. SENT. SRCBK., *supra* note 2, at 44 tbl.27. A total of 7845 sentences (19.2% of the total) involved departures based on substantial assistance. Other downward departures were involved in 4201 (10.3% of the total number) and 388 cases (0.9%) involved upward departures. 1996 FED. SENT. SRCBK., *supra* note 2, at 41 tbl.26.

51. The 10% of sentenced defendants who receive the benefit of other downward departures typically present compelling facts which are evident from the start of the decision process, or are sentenced by a lenient judge.

sentence reduction, all the way down to the gold standard—a sentence of no prison time at all.⁵²

Under the current sentencing regime, cooperation is the only option that significantly alters the most important set of considerations for most defendants—those that relate to the ultimate sentence to be imposed. For many defendants, cooperation offers the only opportunity for significant sentence mitigation or escaping prison all together,⁵³ regardless of the seriousness of the offense. The sentencing reforms of the late 1980s redefined the reality and the perception of the federal criminal defendant's spectrum of choices.

52. Once a judge finds a ground for departing downward from the guidelines, the magnitude of the departure is in his or her discretion. *See, e.g., United States v. Robinson*, 1997 U.S. App. LEXIS 3641, at *3-4 (6th Cir. Feb. 24, 1997) (explaining that the magnitude of departure is in judge's discretion). Judges may impose non-incarceratory sentences in most cases, despite the provisions of 18 U.S.C. § 3561(a) (1), which forbids probation to anyone convicted of a crime carrying a statutory maximum of 25 years or more. *See United States v. Elliott*, 971 F.2d 620 (10th Cir. 1992) (holding that a sentence of no jail is not a probationary sentence and is permitted despite 18 U.S.C. § 3561(a) (1)). *But see United States v. Greene*, 1996 U.S. App. LEXIS 19056, at *1 (4th Cir. June 18, 1996) (finding no difference between a sentence of probation and no imprisonment but noting that cooperators, but not other relevant departure recipients, may receive non-incarceratory sentences). For discussion of the problems engendered by the lack of consistency in practices governing the magnitude of departures see Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1045-46 (1997) (commenting on warranted versus unwarranted disparity and the failure to control the magnitude of departures from the perspective a United States District Court Judge for the District of Massachusetts).

53. The other path to serving no prison time, immunity from prosecution, is very rarely taken. One imprecise measure is the 1493 grants of immunity by federal prosecutors in 1996, BUREAU OF JUSTICE SRCBK., *supra* note 11, at 448 tbl.5.27, a number which includes grants to witnesses whose prosecution was not contemplated but does not include agreements to forego prosecution that do not include immunity. Potential defendants are only occasionally immunized from all prosecutions to induce them to assist the government. The prosecution of several Texaco executives on charges stemming from their alleged efforts to destroy evidence subpoenaed in a civil case illustrates the difficult judgments prosecutors must make. A Texaco official tape recorded incriminating conversations and then offered the tapes to the government in return for immunity from prosecution. The government refused immunity and indicted him instead. He and his co-defendant were acquitted and the government failed to convict anyone. *See United States v. Lundwall*, 97 Cr. 211 (BDP) (S.D.N.Y. 1997); *Ex-Texaco Treasurer Indicted in Race Discrimination Case*, N.Y. TIMES, June 28, 1997, at A36; Kurt Eichenwald, *Texaco Witness is Said to be Talking to U.S.*, N.Y. TIMES, Jan. 8, 1997, at D1.

B. *Not All Prisoners Face the Same Dilemma—The Dynamics of the Supply of Snitches*⁵⁴

1. *The Defendants.* Although every defendant who faces the prospect of imprisonment is interested in mitigation, not every defendant cooperates. This section explores some of the factors that influence a defendant's decisions, including the charge, the defendant's preferences and his or her lawyer's outlook.

Cooperation occurs most frequently in narcotics prose-

54. The prisoner's dilemma game theory model has become the most familiar in the law. See WILLIAM POUNDSTONE, *PRISONER'S DILEMMA* (1992). For further explanation of this model, see generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994), reviewed in Stephen W. Salant & Theodore S. Sims, *Game Theory and the Law: Ready for Primetime?*, 94 MICH. L. REV. 1839 (1996), which has become a standard tool for teachers and students of negotiation theory. See generally ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATION*, 351-57 (1990); DONALD G. GIFFORD, *LEGAL NEGOTIATION THEORY AND APPLICATIONS* 26-28 (1989). The model posits two co-defendants facing identical charges. If neither cooperates with the government, both will get a moderate sentence. If one cooperates and the other does not, the cooperator gets a very lenient sentence while the other defendant receives a harsh sentence. If both cooperate against the other, both receive harsh sentences. See DONALD GIFFORD, *LEGAL NEGOTIATION THEORY AND APPLICATIONS* 26-28 (1989).

The prisoner's dilemma models a negotiation between parties with equal power and equal access to information about everything but the other negotiator's intentions. It teaches students that in many negotiations, defection (usually deceiving or breaking commitments) can gain great benefits, but carries the risk that the other side will behave similarly and both will suffer the worst possible result.

Despite its name, the classic game theory/prisoner's model sheds less light upon the actual choices of typical prisoners. In most cases the decision to cooperate turns on the negotiation between the prisoner and the government and is independent of the decision of other defendants. After all, the government has very broad discretion to set the terms of the cooperation. There are some cases involving two equally culpable defendants, both of whom have no other useful information for the government besides the offer of testimony against the co-defendant. If the government chooses to accept cooperation from only one of them and the government could not otherwise convict the other defendant of the most serious crime the two committed, the structure of the prisoner's dilemma is presented, but even here reality diverges from the model. The government does not provide perfect information about the strength of its case or the sentences that will result from each course of action, and can change the pay out as the game proceeds. See generally Richman, *supra* note 1, at 89-91 (explaining how the reality of cooperation diverges from the model). The prisoner's dilemma much better models the risks and benefits of cooperation and competition in two party negotiation than it models the actual problem faced by most prisoners.

cutions, the single largest group of cases in federal court.⁵⁵ Narcotics trafficking cases, including both substantive and conspiracy charges accounted for more than a third of all sentences imposed in 1996.⁵⁶ In about one-third (31.7%) of narcotics trafficking cases defendants received sentence mitigation for substantial assistance.⁵⁷ Data suggests that many others, perhaps more than 65% of those defendants, provide information to the government, with only a portion receiving the benefit of a cooperation motion.⁵⁸ The typical narcotics trafficking defendant has both a strong incentive and good opportunity to snitch. The incentive stems from the generally high probability of conviction,⁵⁹ made more

55. See 1996 FED. SENT. SRCBK., *supra* note 2, at 14 tbl.9. The link between substantial assistance departures and narcotics offenses reflects both the harshness of the Narcotics Guidelines. See, e.g., U.S.S.G., *supra* note 3, at § 2D1.1, and the mandatory minimums. Government motions pursuant to U.S.S.G. § 5K1.1 for a sentence below the Guidelines range and government motions pursuant to 18 U.S.C. § 3553(e) for a sentence below the statutory mandatory minimum are distinct. The government is free to make one or the other or both, as it deems appropriate. See *Melendez v. United States*, 518 U.S. 120 (1996) (holding that the Guidelines did not create a unitary system—a government motion to depart from the Guidelines does not confer authority upon the court to ignore the mandatory minimum and a separate government motion pursuant to 18 U.S.C. § 3553(e) is required).

56. The Commission's *Distribution of Drug Guidelines Offenses* chart reports a total of 42,436 cases. Of these, 17,267 were sentenced under the various drug Guidelines while 16,196 (38.2% of all cases) were sentenced under the narcotics trafficking portion of the Guidelines pursuant to U.S.S.G. §2D1.1. An additional 1071 (2.5% of all cases) were sentenced under other drug offense Guidelines, with about half that group (550 cases) involving misdemeanor prosecutions for simple possession (including some crack possession cases that can carry a five year mandatory sentence, 21 U.S.C. § 844(a)) and the remainder involving the following: § 2D1.2 Protected Locations 329 cases; § 2D1.5 Continuing Criminal Enterprise 54 cases; § 2D1.8 Renting or Managing Drug Establishments 41 cases). Non-narcotics prosecutions accounted for 25,169 cases (59.3% of all cases). See 1996 FED. SENT. SRCBK., *supra* note 2, at 45 fig.H.

57. Of the 40,818 cases for which the Commission had sufficient data to analyze the departure rate by primary offense category, 15,882 were drug trafficking cases and 5041 of them (31.7%) involved substantial assistance departures in 1996. See 1996 FED. SENT. SRCBK., *supra* note 2, at 14 tbl.9.

58. The Sentencing Commission analyzed 264 defendants in 64 randomly selected narcotics conspiracies prosecuted in 1992. More than 65% of those defendants offered assistance. LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, UNITED STATES SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 26 exh.5 (1998) [hereinafter SENT. COMM. SUBST. ASS. STUDY].

59. Couriers may be arrested carrying significant quantities of narcotics. Low and middle level dealers may have made several sales to undercover agents or confidential informants wearing recording devices. Higher level

onerous by the prevalence of mandatory minimums in narcotics cases.⁶⁰ Defendants in narcotics cases almost always have information to offer. Typically, a number of defendants are prosecuted together. Some may testify against their co-defendants, while others may have information about suppliers, customers or other drug dealers. The benefits of cooperation are dramatic for narcotics defendants, at least when their sentences are compared to sentences of similarly charged defendants who do not cooperate.⁶¹ The Commission's analysis of 1994 data reveals an average sentence reduction of over five years for narcotics trafficking defendants who gain cooperation departures.⁶²

Fraud cases are the next largest group of federally prosecuted crimes but have a lower rate of cooperation (15.8%)⁶³ than narcotics trafficking cases because the

dealers and more sophisticated operations often face hundreds of hours of tapes and months or years of surveillance. While capable defense attorneys can gain acquittals in each type of case, the fact remains that 82% of the defendants who went to trial in 1996 were convicted. See *Defendants Disposed of in U.S. District Courts*, in BUREAU OF JUSTICE SRCBK., *supra* note 11, at 448 tbl.5.27.

60. Of the 17,165 cases sentenced under the narcotics *Guidelines* in 1996, 6365 (37.1%) involved a mandatory minimum sentence of ten years or more. In addition, 4985 (28.9%) involved a five year mandatory minimum and 5842 (34%) involved a mandatory minimum of 12 months or less or no mandatory minimum. Of the 4602 crack cases, 2643 (57.4%) involved a ten year mandatory minimum or greater, while 501 (28.4%) of the 1766 heroin cases, 1919 (42.9%) of the 4471 powder cocaine cases and 411 (9.4%) of the 4249 marijuana cases involved ten year or greater mandatory minimums. 1996 FED. SENT. SRCBK., *supra* note 2, at 53 tbl.38.

61. Some defendants receive mitigation through charging decisions or other downward departures. See *infra* pp. 57-65.

62. The mean decrease in the length of the sentences for the 4791 narcotics trafficking defendants who received 5K1.1 departures in fiscal 1994 was 63.9 months. The mean sentence imposed on the cooperators was 51.6 months. See SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at 32 exh.11. Comparison of cooperation and non-cooperation sentences is impossible with this data because the overall mean sentence reported for narcotics trafficking cases includes the substantial assistance departures. The length of the departure correlates with the length of the predeparture sentence. *Id.* at 17-18, 21. For defendants whose guideline sentence would have been less than five years, the mean decrease was 13.7 months. For those with sentences between 60 and 120 months, the mean decrease was 31 months and sentences over 120 months received a mean decrease of 97.9 months. *Id.* at 32 exh.11.

63. Of the 5789 fraud defendants, 913 (15.8%) received substantial assistance departures. See 1996 FED. SENT. SRCBK., *supra* note 2, at 14 tbl.9. Some other federal crimes such as immigration and larceny offenses, show very low rates of cooperation. Of the 4715 immigration cases, only 134 (2.8%)

penalties are lower, their information is less valuable and they often have other opportunities for mitigation. Fraud cases encompass a much broader class of conduct than the narcotics trafficking cases. Although some fraud defendants receive very long sentences, as a group their ultimate punishment is neither as severe nor as certain⁶⁴ as the narcotics defendants. The average sentence for fraud cases in 1996 was 13.2 months, while the average sentence for narcotics trafficking was 82.8 months.⁶⁵ Lower average sentences reduce the incentives to cooperate. A lesser punishment simply provides less absolute motivation to snitch. There is also less to be gained on a relative basis because the best predictor of the magnitude of the departure is the length of the pre-departure sentence.⁶⁶ The average reduction in fraud sentences for substantial assistance was only 5.2 months.⁶⁷

Defendants in fraud cases are also generally less likely to have information to offer the government. Unlike drug dealers, their crimes are more often individual or confined to a small circle of people, and they are not inevitably immersed in a world of criminality as a result of their wrongdoing. Fraud cases also include "white collar" cases, which typically involve the different dynamic of aggressive, pre-indictment representation which more often results in

involved substantial assistance. Of the 2311 larceny cases, only 141 (6.1%) received substantial assistance departures. *Id.* Some crimes simply do not lend themselves to snitching. The typical federal immigration offense involves a lone defendant or a group of equally culpable people whose conviction is straightforward.

64. The absence of mandatory minimum sentences for fraud defendants opens the possibility of the full range of *Guidelines* arguments and ordinary *Guidelines* departures. *See supra* note 41.

65. 1996 FED. SENT. SRCBK., *supra* note 2, at 22 tbl.13.

66. *See* SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at 18.

67. The mean decrease for fraud cases was 5.2 months. *Id.* at 32 exh.11. Of course, some fraud cases do involve long prison sentences. *See, e.g.,* United States v. Hoffenberg, 1997 U.S. Dist. LEXIS 2394, at *1 (S.D.N.Y. Mar. 5, 1997) (sentencing opinion imposing a twenty year term in a multi-million dollar securities fraud case involving the failure of Towers Financial Corporation, subject to a sentencing hearing). Other fraud defendants facing relatively little jail time are very sensitive to the possibility of avoiding incarceration completely and may cooperate even if facing relatively modest sentences. Twenty percent of fraud defendants received probation only sentences, compared to 2.8% of the narcotics defendants. An additional 16.4% of the fraud defendants received a combined probation and confinement sentence. 1996 FED. SENT. SRCBK., *supra* note 2, at 21 tbl.12.

non-prosecution agreements or individually tailored cooperation agreements.⁶⁸

There are also disincentives to cooperation. Most defendants share the general moral discomfort with snitching.⁶⁹ For some, however, the taboo is especially strong. Racketeering cases may involve the classic organized crime defendant, for whom cooperating carries so great a risk and so much stigma that they choose long prison sentences instead.⁷⁰ Leaders of other large criminal organizations may also feel both a greater commitment to criminality and a special aversion to cooperation because they so fear the consequences of co-conspirator disloyalty.⁷¹ The increase in snitching, however, strongly suggests that the current sentencing structure has reduced whatever honor there may have been among thieves.

Another common disincentive is fear of physical retaliation against the cooperator or his or her family.⁷² The government has a very strong interest in addressing threats

68. See generally KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985) (describing the results of an in-depth study of some members of the white collar defense bar in New York).

69. The general moral discomfort with cooperation is discussed *infra* nn. 75-80. It is commonly assumed that other prisoners see snitches in a very bad light. An illustration of this attitude can be found in the words of an inmate discussing the worst aspects of prison in a fascinating inside look at day-to-day life in prison from both the inmates' and penological perspectives. Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1156 (1990) (presenting an inmate's discussion about the worst parts of prison including among them the problem posed by officers who try to make snitches out of prisoners they see as weak); see also Richman, *supra* note 1, at nn.35-38.

70. See Richman, *supra* note 1, at n.35 (discussing the oath of secrecy in classic organized crime cases and the prosecution of John Gotti, which turned largely on the testimony of his former confederate, Salvatore Gravano).

71. I have not considered the innocent defendant, who may see cooperation as offering too good a deal to pass up. This is a special case of the innocence problem in plea bargaining. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 909, 946-66 (1992) (discussing the problem of innocent defendants taking advantageous pleas and suggesting reforms to improve plea bargaining); Schulhofer, *supra* note 10, at 1980-86 (1992) (arguing in response to Scott and Stuntz that the innocence problem is more theoretical than real but other structural flaws mandate the elimination of plea bargaining).

72. See Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 734 (1980) (explaining that fear of retaliation is the biggest disincentive to cooperation). The Substantial Assistance Guideline recognizes threats of harm as a specific factor judges should consider in evaluating cooperation. See U.S.S.G., *supra* note 3, § 5K1.1.(4).

against cooperators.⁷³ For an incarcerated cooperator this can require separation from co-defendants and other security measures that mark him or her as a cooperator within the institution. Threats against family may require relocation or other security measures, and ongoing threats following release may caution cooperators.⁷⁴

Defendants bear other risks that may be less readily apparent than threats to safety and reputation, such as the possibility that they will receive no reward, or a harsher sentence, despite their good faith effort to cooperate. The government assigns these risks to defendants at the intersection of two powerful legal concepts, prosecutorial discretion and freedom of contract. Taken together the two doctrines as interpreted by the case law permit prosecutors to structure cooperation to almost completely control whether and how they will pay for cooperation and to put as much of the risk of dishonesty as possible on the snitch. The defendant's risks decrease as the process moves from the relatively unstructured first meeting to a formal agreement which affords some protections. Even at the very end, however, the defendant faces the risk that the sentencing judge will deny the government's request for mitigation and impose a harsh sentence. Defendants can do little to shift risk back to the government because each supplier (defendant) is a one shot player, who cannot engage in group action and can only sell his or her commodity to a single buyer,⁷⁵ who enjoys both the ordinary broad power a superior negotiating position confers in our contract law regime and the special powers that come with the duty to enforce the law.

The government's power to simply refuse to pay for cooperation is illustrated by *Wade v. United States*,⁷⁶ in which

73. For some examples of retaliation, see MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE 3-8 (1985).

74. There are also defendants who fear economic reprisal.

75. A single buyer of a good which has multiple sellers is a monopsonist. See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1472-74 (1993) (analyzing the government as the sole purchaser of defendants' convictions and arguing that the only effective counterweight to the power of that position is to redisperse sentencing power by returning sentencing discretion to judges).

76. 504 U.S. 181 (1992). Judicial constraints are only one kind of limit on prosecutorial discretion. See Standen, *supra* note 75, at n.7 (explaining that there are many factors that affect prosecutorial discretion including the impact of supervisors, the desire to win and other role related pressures).

the Supreme Court held that a defendant has no remedy for a prosecutor's refusal to move for a substantial assistance departure, except in the case of a refusal based on unconstitutional class based discrimination or irrationality.⁷⁷ At the time of his drug related arrest, Mr. Wade gave information that led to the arrest of another drug dealer. He was later indicted and pled guilty without a cooperation agreement. At sentence, his counsel urged the court to impose a sentence below the ten year mandatory minimum. The sentencing judge refused, ruling that the court lacked authority to depart in the absence of a government motion. When counsel argued that the government's refusal violated Mr. Wade's rights, the court asked for a proffer of what the defense would show at a hearing. Justice Souter noted:

In response his counsel merely explained the extent of Wade's assistance to the Government. This, of course, was not enough, for although a showing of assistance is a necessary condition for relief, it is not a sufficient one. The Government's decision not to move may have been based not on a failure to acknowledge or appreciate Wade's help, but simply from its rational⁷⁸ assessment of the cost and benefit that would flow from moving.

Although *Wade* involved a defendant who did not have any agreement with the government, informal and even formal agreements will often provide no protection against a prosecutor's refusal to reward a cooperator who has complied with his or her agreement.⁷⁹

Unsuccessful efforts to cooperate can have consequences beyond the failure to receive a substantial assistance departure. Defendants who negotiate with the government⁸⁰

77. *Wade*, 504 U.S. at 181, is consistent with earlier cases such as *Wayte v. United States*, 470 U.S. 598 (1985), in requiring that defendants make a substantial threshold showing before a court will order discovery or an evidentiary hearing on a claim that the prosecutor's refusal to move for a substantial assistance departure, in the absence of any agreement between the parties, violated constitutional prohibitions on prosecutors acting out on invidious motives or in ways not rationally related to any government end. See also *Chapman v. United States*, 500 U.S. 453 (1991) (holding that including the weight of the carrier medium in assessing penalties is not irrational).

78. 504 U.S. at 187 (citations omitted).

79. The cases are discussed below, see *infra* nn. 93-106.

80. The attempt to negotiate a cooperation deal usually begins with a proffer, or debriefing session attended by the defendant, his or her lawyer, the prosecutor and the investigating agents, in which the defendant describes his or

but do not enter into formal cooperation agreements⁸¹ may be unaffected by the failed attempt at cooperation.⁸² They may even gain some other benefit of prosecutorial discretion, such as a favorable charging decision that could be as valuable, or even more valuable than cooperation.⁸³ There are also several ways that unsuccessful efforts to cooperate can result in worse outcomes for a defendant. He or she may suffer the stigma of cooperation without the sentence benefit, if word gets out that he or she tried to cooperate. If the government believes the defendant has lied, he or she

her own conduct and outlines the kind of aid he or she can offer the government. They are generally conducted pursuant to agreements which give the defendant limited use immunity. Often the government agrees not to use the defendant's statements in its case in chief, should there be a trial, but reserves the right to use the information to get other evidence and for cross examination, as well as in prosecutions for perjury or false statements.

The Supreme Court captured the essence of the contemporary proffer session more than 100 years ago in describing the dynamics of the early meetings at which the value of a proposed cooperator's information is evaluated:

Of all others, the prosecutor is best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge. Applications of the kind are not always to be granted, and in order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communications he may make to the prosecutor will be strictly confidential. Interviews for the purpose mentioned are for mutual explanation, and do not absolutely commit either party; but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview, nor any inducement held out beyond what the before-mentioned usage and practice of the courts allow.

Prosecutors in such a case should explain to the accomplice that he is not obliged to incriminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates.

The Whiskey Cases, 99 U.S. 594, 603-04 (1878).

81. A formal cooperation agreement is a final, integrated agreement that supercedes any proffer or other preliminary agreements and sets out the charges to which the defendant will plead, his or her other obligations and specifies the government's reciprocal obligations. Formal agreements are discussed *infra* pp. 587-93.

82. At least as measured by their ultimate sentence, if they suffer no collateral consequences from the attempt to cooperate. They have lost something in giving information and getting nothing in return, but there is no other buyer for the information so they cannot, and could not, have sold it elsewhere.

83. Other discretionary mechanisms prosecutors use to mitigate sentences are discussed below, *see infra* pp. 608-11.

may be denied the benefit of acceptance of responsibility and could face a sentence enhancement for obstruction of justice.⁸⁴ The defendant may also reveal other crimes or criminal conduct that could result in new charges or an increased sentence.⁸⁵

Moving beyond the very first stages of negotiation exemplified by *Wade* and entering into a preliminary agreement with the government holds its own risks for defendants. Although some can bargain for better terms in these preliminary agreements, most cannot.⁸⁶ Defendants often give up significant rights and will be held to the strict letter of the agreements.⁸⁷ In *United States v. Mezzanatto*,⁸⁸ the Supreme Court enforced a preliminary proffer agreement in which the defendant waived the evidentiary privilege against the introduction of statements made in plea discussions.⁸⁹ The Court noted that "absent some overriding

84. U.S.S.G., *supra* note 3, § 3C1.1.

85. The degree of protection afforded statements made during cooperation is determined by whatever agreements the parties make. *Wade* offers an example of a proffer agreement providing limited use immunity but permitting the government to use the defendant's statements to gather other evidence which would then be admissible against him or her and to use the defendant's own statements on cross examination, should a trial occur. *Wade*, 504 U.S. at 186-87. The *Guidelines* provide limited protection for information revealed during cooperation. U.S.S.G., *supra* note 3, § 1B1.8 That *Guideline* only protects information if the defendant enters into an agreement which prohibits use of the information and then only offers limited protection.

86. Most defendants simply do not have valuable enough information to bargain effectively with the prosecutor. Even those who do may calculate that they are better off winning the prosecutor's favor and gaining the greatest benefit rather than worrying about legal rights that will come into play if the deal goes awry and they are forced to litigate against the party they had hoped would become their supporter. One countervailing factor is that many districts use a standard agreement which incorporates favorable terms that the few relatively strong defendants managed to negotiate.

87. Although some have argued that the power imbalance inherent in plea bargaining renders all plea agreements contractually deficient, see Scott & Stuntz, *supra* note 71, at 1909 n.4 & 1912 n.11, a critique that would certainly apply to substantial assistance motions, Scott & Stuntz convincingly argue that the fundamental norms underlying contract law support the enforcement of contracts between parties of vastly unequal bargaining power, including defendants and prosecutors. *Id.* Less convincing is their argument that problems arising from strategic interactions of the parties is a relatively easily remedied structural problem. See Schulhofer, *Plea Bargaining as Disaster*, *supra* note 10.

88. 513 U.S. 196 (1995).

89. See Fed. R. Evid. 410. Mr. Mezzanatto was arrested on federal narcotics charges and made an initial proffer to the government. He signed an agreement

procedural consideration that prevents enforcement of the contract," courts have enforced agreements to waive evidentiary rules.⁹⁰ Defendants will be held to their agreements to surrender important rights.

Defendants who progress to formal cooperation agreements usually fare better, but these agreements are also carefully drafted for the government's benefit. They are typically quite clear on the defendants obligations⁹¹ and uncertain about his or her rewards.⁹² Perhaps the greatest and

granting him limited immunity and permitting the government to use any statements he made that day to impeach him if he took the case to trial and testified. During the session he minimized his role in the case and the meeting ended after he was confronted with surveillance evidence that contradicted his statements. At his trial Mr. Mezzanatto was confronted with damaging admissions he had made at his meeting with the government that contradicted his testimony on direct examination. 513 U.S. at 199.

90. 513 U.S. at 202 (quoting 21 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5039, at 207-08 (1977)).

91. Defendants bear the risk that any breach on their part will result in termination of the agreement. Some cases provide clear justification for the prosecutor's decision to walk away from the deal including the the following cases: those involving escape from custody, *United States v. Holmes*, No. 96-6080, 1998 WL 124053 (6th Cir. Mar. 30, 1998) (holding that defendant's escape from prison violated agreement), the commission of other crimes, *United States v. Fernandez*, 127 F.3d 277 (2d Cir. 1997) (declaring that cooperating witness violated his agreement in four tape recorded conversations with former co-defendant offering to fix case for \$10,000 and rejecting argument that government received benefit of cooperation through eventual plea by co-defendant so cooperator should receive his benefit), the withholding of information, *United States v. Garcia-Velilia*, 122 F.3d 1 (1st Cir. 1997) (explaining that defendant's refusal to disclose names of suppliers of cocaine used by defendant while on pre-trial release was sufficient ground for breach and court did not have to consider whether agreement implicitly required that defendant not commit other crimes), the telling of lies, *United States v. Armstrong*, 842 F. Supp. 92 (S.D.N.Y. 1994) (holding that defendant's information proved unreliable therefore the agreement was terminated), or the refusal to testify, *United States v. Hon*, 17 F.3d 21 (2d Cir. 1994) (holding that defendant's refusal to testify violated agreement). Others involving apparently less serious conduct illustrate the allocation of virtually all of this risk to the defendant. See *United States v. Brechner*, 99 F.3d 96 (2d Cir. 1996) (illustrating how the court accepted government's decision to terminate agreement when defendant denied a key fact and then admitted it after immediate consultation with attorney).

92. Typically, the terms of the agreement obligate the defendant to do the following: plead guilty to the most serious count against him or her, be completely truthful, provide whatever assistance the government seeks, commit no other crimes and waive legal protections offered by the rules of evidence, statutes of limitations and any other additional doctrines added to this list by the government. The government typically agrees that the particular U.S.

most disturbing risk these agreements assign to the cooperator is that his or her cooperation may be judged not worth rewarding after he or she has performed. Some agreements simply provide that the government may, in its discretion, file a motion for a substantial assistance departure.⁹³ The government also can, and does, bargain away its discretion and commit to making the motion if the defendant complies with the agreement,⁹⁴ but prosecutors may still claim that the defendant's assistance was not "substantial" and thus, not in compliance with the deal.

It is difficult to generalize about how often the government refuses to make a substantial assistance motion because the cooperation is not deemed valuable enough,⁹⁵

Attorney's Office entering into the agreement will not further prosecute the defendant for the conduct he or she has revealed to the government and will inform the sentencing judge of the defendant's assistance. See Richman, *supra* note 1, at 99 (offering examples of agreements which make the defendant's obligations clear and the expected reward vague).

93. See, e.g., *United States v. Harris*, 1997 U.S. App. LEXIS 16555, at *1, *3 (4th Cir. July 7, 1997) (holding that cooperation agreement gave government discretion to determine whether to make the motion); *Shehee v. United States*, 1997 U.S. App. LEXIS 2886, at *1-2 (6th Cir. Feb. 14, 1997) (explaining the agreement was that the government "may" move for a downward departure).

94. However, the government's discretion can be relinquished and, in fact, "once the government uses its § 5K1.1 discretion as a bargaining chip in the plea negotiation process, that discretion is circumscribed by the terms of the agreement." *United States v. Conner*, 930 F.2d 1073, 1075 (4th Cir.). See also *Nasman v. United States*, 1997 U.S. App. LEXIS 6389, at *1, *5-6 (6th Cir. Apr. 1, 1997) (remanding with instructions that the government must fulfill the agreement and make a downward departure motion at the resentencing); *United States v. Courtois*, 131 F.3d 937 (10th Cir. 1997) (government may bargain away discretion); *United States v. Hernandez*, 17 F.3d 78 (5th Cir. 1994) (quoting *United States v. Watson*, 988 F.2d 544, at 552-53 (5th Cir. 1993), for proposition that government can bargain away its discretion). The government may also limit its discretion by accepting an explicit obligation to exercise "good faith" in deciding whether or not to make the motion. See *United States v. Gonsalves*, 121 F.3d 1416 (11th Cir. 1997) (holding that the agreement included an express governmental obligation of good faith which was satisfied in this case).

95. It is difficult to even speculate about how often this happens. One case offers evidence that at least one judge thinks it a problem in the Southern District of Texas. In a case reversed because the defendant was mistakenly told at arraignment that the court had greater review power over the government's decision than it came to believe it could exercise at sentence, the judge is quoted in a footnote saying, "And this happens with some frequency, where there is lots of talk of Section 5K1.1 at time of plea, and then that magically disappears at time of sentencing." The judge goes on to suggest that the United States Attorney's Office be clearer in setting out its expectations for cooperators. *United States v. Amaya*, 111 F.3d 386, 388-89 n.4 (5th Cir. 1997).

but there is a steady flow of litigation in which defendants have challenged the government's evaluation of their assistance. Courts have resolved these disputes in three different ways. Some courts have simply held the parties to the literal terms of their bargain and permitted the government to exercise absolute discretion, reviewable only for unconstitutional motive under *Wade*.⁹⁶ Other courts have reviewed the government's decision for rationality under *Wade*.⁹⁷ A third group has used contract law to impose an implied duty of good faith upon the government.⁹⁸ Even that last,

96. See, e.g., *United States v. Garcia-Bonilla*, 11 F.3d 45, 47 (5th Cir. 1993) (government's refusal to make a departure motion was held unreviewable absent an unconstitutional motive where agreement "expressly provides that the government retains absolute discretion to move for a downward departure").

Other courts have held that absolute governmental discretion is the default rule unless the agreement explicitly limits its decision making. See, e.g., *United States v. Deollos*, 1998 U.S. App. LEXIS 160 (10th Cir. Jan. 7, 1998) (holding that government retains unfettered discretion unless plea agreement includes an express promise); *United States v. Rockwell Intern. Corp.* 124 F.3d 1194 (10th Cir. 1997) (holding the same); *United States v. Courtois*, 131 F.3d 937 (10th Cir. 1997) (holding the same).

97. See, e.g., *United States v. Copeland*, 122 F.3d 1063 (4th Cir. 1997) (stating that the refusal to make motion was found not rationally related to any government purpose where district court had extensive opportunities to see cooperator testify and had basis to find that her refusal to implicate one individual was justified and credible); *United States v. Pipes*, 125 F.3d 638 (8th Cir. 1997) (explaining that review is limited by *Wade* but includes rationality test; case remanded for hearing, with dissent arguing that defendant did not make substantial showing required for a hearing); *Sullivan v. United States*, 11 F.3d 573, 575 (6th Cir. 1993) (discussing that an agreement obligated the government to make the motion if the defendant provided substantial assistance and also explaining the government's reasons for determining the assistance not substantially "rational and acceptable").

98. Those courts have limited *Wade* to cases in which there was no plea agreement and hold the government to a general duty of good faith under contract principles. The Second Circuit has ruled that although the prosecutor is in the best position to evaluate the defendant's cooperation, "the prosecutor's discretion is not unfettered. '[W]here the explicit terms of the cooperation agreement leave the acceptance of the defendant's performance to the sole discretion of the prosecutor, that discretion is limited by the requirement that it be exercised in good faith.'" *United States v. Resto*, 74 F.3d 22, 26 (2d Cir. 1996) (quoting *United States v. Khan*, 920 F.2d 1100, 1105 (2d Cir. 1990) (additional citations omitted)). See also *United States v. Knights*, 968 F.2d 1483 (2d Cir. 1992) (remanding case for further findings where trial court's finding that government's refusal to move for substantial assistance downward departure was made in good faith was not supported by record which showed defendant performed by testifying at a trial and government's reasons for denying motion included four factors that were known at the time the agreement was signed; the government's reasons also included allegation that

most stringent review of a prosecutor's decision not to reward a defendant who has performed his or her obligations under a cooperation agreement transfers little risk to the government. Courts sometimes order hearings and may even order the government to make the motion if a breach is found,⁹⁹ but the overall trend is to leave even the cooperator who complies fully with his or her agreement subject to the government's evaluation of his or her cooperation.

Defendants also bear the risk that the government will move for a substantial assistance downward departure, but will provide a lukewarm evaluation of the cooperation. Although defendants in egregious cases may get relief,¹⁰⁰ typical cases involve a judicially acceptable lack of prosecutorial enthusiasm or the inclusion of unhelpful facts in the government's recitation of the cooperator's assistance.¹⁰¹

Another risk is that the judge will give either little or

trial testimony was inconsistent with others but there was no allegation on the record that the testimony was untruthful); *United States v. Isaac*, 141 F.3d 477 (3d Cir. 1998) (applying contract principles to permit court review of whether government acted in good faith in evaluating defendant's cooperation pursuant to an agreement). The Eleventh Circuit has criticized this approach as too invasive of prosecutorial discretion. *See United States v. Forney*, 9 F.3d 1492, 1501-03 (11th Cir. 1993).

99. *See Pipes*, 125 F.3d at 638 (holding that a hearing is required to determine rationality of decision based on hearsay allegations of cooperator's lack of reliability); *United States v. Rounsavall*, 128 F.3d 665 (8th Cir. 1997) (remanding case for hearing to determine if the government's refusal to make the motion stemmed irrationally from the defendant's brother's refusal to cooperate); *United States v. Leonard*, 50 F.3d 1152, 1154 (2d Cir. 1995) (stating that hearing required to develop record to permit district judge to evaluate government's claim that cooperator changed his story); *Knights*, 968 F.2d at 1483 (remanding case for hearing); *United States v. Ganz*, 806 F. Supp. 1567 (S.D. Fl. 1992) (ordering government to make substantial assistance motion after court reviewed and evaluated defendant's cooperation and government's actions in refusing motion).

100. *See, e.g., United States v. Canada*, 960 F.2d 263, 269 (1st Cir. 1992) (explaining that there was a breach of agreement to make a specific sentence recommendation when prosecutor followed recommendation by urging the court to "impose a lengthy period of incarceration" and to "send a strong message").

101. *See United States v. Jimenez*, 992 F.2d 131, 135 (7th Cir. 1993) (finding no breach where prosecutor made the promised sentence recommendation but questioned the validity of the defendant's assertion of threat of physical harm, made for the first time at the sentencing hearing); *United States v. Benchimol*, 471 U.S. 453 (1985) (deciding that plea agreement does not bind the government to express any particular level of enthusiasm for the recommended sentence and there is no breach of the agreement if the government leaves the sentencing court with the impression that it is less than enthusiastic).

no reward to the cooperator.¹⁰² The court's decision whether and how much to mitigate the sentence is unreviewable on appeal¹⁰³ and may turn on the court's own evaluation of the cooperation,¹⁰⁴ the offense¹⁰⁵ or leniency already granted the defendant in the plea agreement.¹⁰⁶

Despite all the disincentives and risks, defendants flock to proffer sessions. For many, the prospect of a long prison sentence simply overwhelms every other consideration. Even for those inclined to a cooler assessment of their situation, the risk of receiving no or little reward through the exercise of prosecutorial or judicial discretion may be of little consequence. Given the bad outcome that they expect, a small chance of mitigation is still a better alternative

102. The magnitude of the departure might be seen as an aspect of the price paid for cooperation that is controlled by the judge, but his or her ability to effect the market (influence defendants' decisions about cooperation) through that pricing power is limited. Only the prosecutor can open the door to a substantial assistance departure and the defendant often does not know the identity of the judge when he or she has to decide whether or not to cooperate. In addition, prosecutors exercise a fair degree of influence over the magnitude of the departure. Most federal judges are understandably inclined to listen carefully to the prosecutor's characterization of the value of the cooperation and use it to calibrate the magnitude of the departure.

103. See 18 U.S.C. § 3742 (1997) (permitting appeals of sentences imposed in violation of the law, resulting from incorrect application of the *Guidelines* and outside the *Guideline* range, but not sentences within a lawful and correctly determined *Guideline* range). See, e.g., *United States v. Ramos-Rosa*, No. 96-1912, 1997 WL 312177, at *1 (1st Cir. June 9, 1997) (determining that decision about whether and how much to depart from government's sentence recommendation is unreviewable so long as court recognized and exercised its discretion); *United States v. Light*, No. 96-5482, 1997 WL 720386, at *4 (6th Cir. Nov. 10, 1997) (reasoning that judge's decision not to depart from government's sentence recommendation, after government motion, is not cognizable on appeal).

104. See *United States v. Winters*, 117 F.3d 346 (7th Cir. 1997) (utilizing judge's own evaluation of defendant in sentencing process); *United States v. Lucas*, 17 F.3d 596 (2d Cir. 1994) (refusing a downward departure based on judge's review of defendant); *United States v. Foster*, 988 F.2d 206 (D.C. Cir. 1993); *United States v. Dellinger*, 986 F.2d 1042 (6th Cir. 1993); *United States v. Mittlestadt*, 969 F.2d 335 (7th Cir. 1992); *United States v. Dobyne*, 905 F.2d 1192 (8th Cir. 1990); *United States v. Cloughley*, 901 F.2d 91 (8th Cir. 1990).

105. See *United States v. Casiano*, 113 F.3d 420 (3d Cir. 1997) (determining that sentencing court is not limited to the factors set out in § 5K1.1 and properly considered seriousness of underlying offense in limiting substantial assistance departure to three levels).

106. See *United States v. Carnes*, 945 F.2d 1013 (8th Cir. 1991) (limiting extent of departure by consideration of plea bargain benefit); *United States v. Sutherland*, 890 F.2d 1042 (8th Cir. 1989); *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989).

than no chance of mitigation. Finally, it bears noting that many defendants are not particularly good at assessing risk and exercising judgment. People with those strengths are less likely to commit crimes—or at least arguably less likely to get caught.

2. *The Defense Lawyers.* Another actor who influences the decision to cooperate is the defense lawyer.¹⁰⁷ Defendants do not generally learn about or respond to their legal predicament directly. They are represented by defense attorneys who have their own interests and motivations. This is the problem of agency costs.¹⁰⁸ Lawyers play a particularly important role in their clients' decision-making about cooperation because so much turns on predictions about the relative benefits of the uncertain path of cooperation, compared to taking an ordinary plea or going to trial.¹⁰⁹

Lawyers have a variety of reasons for favoring or disfavoring cooperation. Most fundamentally, they may simply be ideologically opposed to cooperation, as are many defendants.¹¹⁰ They also have practical concerns. Lawyers in private practice may view representing a cooperator as a threat to future business¹¹¹ or as a selling point to future

107. See Richman, *supra* note 1 (analyzing extensively and insightfully lawyers' incentives and disincentives to cooperate).

108. See Schulhofer, *Criminal Justice Discretion as a Regulatory System*, *supra* note 9, at 50-59 (discussing agency costs for both prosecution and defense); Schulhofer, *Plea Bargaining as Disaster*, *supra* note 10.

109. Although the hypothetical narcotics defendant discussed above, *supra* note 44, who faces a long sentence and against whom the government has strong evidence may seem to have a relatively straightforward decision that is likely to lead to cooperation, much may depend on how the lawyer presents the situation. For example, the lawyer may highlight the dangers and risks or the benefits of cooperation. More subtly the chances of cooperation may be maximized by presenting the mandatory minimum first and emphasizing the dangers of trial. Conversely, the chance of cooperating may be minimized by a counseling strategy that emphasizes the choice between trial and plea with a passing mention of cooperation near the close, once a decision between those options has begun to form. The lawyer will have relatively less influence on a strong-willed client who perceives himself or herself as well informed but can have great influence, and may exercise it consciously or unconsciously, on the many defendants who are terrified by their situation and mystified by the complexities of our legal system.

110. Richman, *supra* note 1, at 117.

111. One extreme example is a case involving a lawyer paid by someone other than the defendant. This lawyer actively discouraged his client from co-

clients, depending on their area of specialization within the defense bar.¹¹² Appointed counsel's strong incentive to resolve cases with plea bargains¹¹³ will tend to encourage cooperation deals. In the best light, cooperation permits zealous appointed defenders to help some of their provably guilty clients get sentencing relief¹¹⁴ and efficiently handle large caseloads so they can focus their limited resources on the relatively few winnable cases.¹¹⁵ Those considerations apply to institutional appointed defenders who have the additional incentive of fostering positive long-term relationships with their institutional adversaries by working together in cooperation cases.

B. *The Demand For Cooperation—The Prosecutor's Robust Appetite for Evidence*

There is only one buyer for cooperation in each federal district: the Office of the United States Attorney.¹¹⁶ Federal

operating by telling her she would receive no benefit from doing so. Furthermore, he advised her to falsely exculpate herself at the one proffer session conducted at the client's insistence. See *United States v. Gonzalez-Bello*, 10 F. Supp.2d 232, 235 (E.D.N.Y. 1998).

112. See Richman, *supra* note 1, at 121-22 (reasoning that a defendant considering cooperation as an option might want a lawyer with some experience in such matters while those defendants who believe their interests are best served by insuring that no one among them cooperates will seek out lawyers with strong reputations for never representing cooperators).

113. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 150 n.124 (1997) (presenting collected studies showing that defendants represented by appointed counsel plead at a higher rate than those represented by retained counsel).

114. There is a tension between the goal of minimizing punishment through cooperation and the culture of institutional defense lawyers which Stuntz characterizes as "valuing fighting the system and gaining victories, whole or partial in any legal way possible." *Id.* at 155 n.132 (claiming public defenders see themselves as fighting the system). This clash explains why one of the nation's most highly regarded and aggressive public defender offices, Public Defender Services of Washington, D.C., decided not to represent any cooperators. See generally Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEORGETOWN L.J. 2419 (1996).

115. Bill Stuntz argues that institutional defenders are best understood as triaging their cases, maintaining an aggressive adversarial stance in the relatively few cases that appear winnable and taking a more conciliatory, case-processing approach in others. Stuntz, *supra* note 113, at 159 n.145.

116. See Standen, *supra* note 75, at 1472 (stating that a prosecutor is a

prosecutors have always wanted and used cooperation and there is reason to think their strong interest in snitches has only grown in recent years. There are three major reasons for the strong demand for cooperation. First, it can be a powerful law enforcement tool. Snitches may make it possible to prosecute significant crimes that might otherwise go unpunished.¹¹⁷ They can also provide the only complete narrative of a conspiracy whose details would otherwise only be presented to a jury in incomplete snatches obtained through wiretaps, undercover testimony and other investigative tools that cannot match an insider's view.¹¹⁸ But the obvious law enforcement value is not the only thing about snitching that makes it so attractive to prosecutors. It also appeals to their desire to minimize the risk of acquittals and control the outcome of their cases.

Every prosecutor wants to maximize his or her conviction rate, or at least minimize acquittals, which, to put it bluntly, they simply hate.¹¹⁹ There are several reasons for their aversion to not guilty verdicts. The rate of trial success drives the plea bargaining process. If defendants, and their lawyers, believe they stand little chance of a trial victory, they will be more inclined to plead guilty. Efficient resolution of the large number of cases requires that trial success rates be kept high.¹²⁰

monopsonist or single buyer). For a brief history of the offices of the United States Attorneys, their relationship to Washington and the selection of federal prosecutors, see Griffin Bell & Daniel Meador, *Appointing United States Attorneys*, 9 J.L. & POL. 247 (1993) (calling for merit selection of U.S. Attorneys controlled by the Attorney General).

117. Michael Fortier's cooperation in the Oklahoma City bombing case and Salvatore Gravano's testimony against convicted crime boss John Gotti are two examples. See Jo Thomas, *Swift, Hard Attack in Bombing Trial*, N.Y. TIMES, May 12, 1997, at A3; Joseph P. Fried, *Ex-Mob Underboss Given Lenient Term for Helping as Witness*, N.Y. TIMES, Sept. 27, 1994, at A1.

118. See generally Daniel Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT. REP. 292, 293 (1996).

119. See Daniel Richman, *Old Chief v. United States*, 83 VA. L. REV. 939, 965-68 (1997) (discussing prosecutors' motivation and arguing that prosecutors care less about winning than about not losing).

120. See *id.* at 142 n.99 (citing, *inter alia*, Sidney I. Lezak & Maureen Leonard, *The Prosecutor's Discretion: Out of the Closet, Not Out of Control*, in CARL F. PINKELE & WILLIAM C. LOUTHAN, DISCRETION, JUSTICE AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE 44, 46 (1985) ("Winning is important not only for the ego satisfaction and enhancement of reputations that victory brings, but also because a record of winning makes it easier to dispose of cases by favorable

Trial success is also a key measure of a prosecutor's performance, for both the prosecutor him or herself and for supervisors. Many prosecutors, as well as defense lawyers, see themselves as "trial lawyers." Their role satisfaction, standing among their peers and effectiveness as negotiators can all turn on their ability to believe and project their belief that they will win any case they try. The importance of convictions from both a docket control and personal standpoint explains why conviction rates are also used by supervisors as an important evaluative tool. Supervisors recognize the importance of conviction rates and share the role assumptions of their assistants and adversaries.¹²¹

Federal prosecutors, in the final analysis, are simply supposed to win their trials. They have the opportunity to exercise their discretion to select the relatively few cases they can prosecute from among the potential cases. They have the power to dismiss problematic cases¹²² and offer attractive pleas to resolve meritorious cases that have proof or other technical problems. Although there are some cases that must be tried,¹²³ federal prosecutors can minimize their need to try weak cases.¹²⁴

The pressure to minimize acquittals leads prosecutors to be very risk averse. Given those pressures and the heavy burden of proof, most prosecutors are anxious to gather as much evidence as possible. If the case is strong enough it may induce a plea. If it must be tried, the prosecutor would rather have too much evidence and find his or her proof limited by the trial judge as cumulative than have too little

plea bargains in the future.")).

121. *Id.*

122. Indeed many more cases are dismissed than are tried in the federal criminal justice system. See *supra* note 11.

123. Federal prosecutors must prosecute some classes of cases which can be very difficult to win, such as criminal civil rights cases against police officers and some prosecutions of political figures. Dismissal or very lenient pleas in those cases, in order to minimize the risk of acquittal, would send a very dangerous message to other potential defendants.

124. Perhaps this only seems like an insight to a defense lawyer who represents indigent clients, but it was a revelation to me when a prosecutor first told me that he was supposed to win and the defense was supposed to lose. In addition, while I needed feel no shame in losing a case that had survived his discretionary charging decision, he had the burden of only going forward with cases he believed he could and should win. Although I wish the world were that simple, the system works well enough to give that view more than a grain of truth.

evidence and risk losing the case.

The line prosecutor's strong appetite for evidence is only increased in narcotics conspiracy cases. Matched with those defendants' strong incentives to cooperate is the prosecutor's particular evidentiary problem, which only a snitch can solve. Even in the very strong case in which there are tape recordings and a sale to an undercover agent, only the snitch can provide the full narrative.¹²⁵ Only the flipped co-defendant can tell the jury the inside story and head off the common defense effort to fill in the empty spaces with doubts and exculpatory theories. How much evidence does the prosecutor really need? No line assistant really wants to find out what the minimum is because the only way to really know is to lose some cases.

Cooperation also directly contributes to the goals of minimizing the number of acquittals and moving the docket. Cooperators plead guilty. They are never acquitted at trial and add to the numbers of pleading defendants who, taken together, form a persuasive argument to others that they too should not contest their cases.

The third general reason that prosecutors are attracted to cooperation is that it permits them to exercise discretion to control sentences.¹²⁶ Under the old law, judges and prosecutors exercised great discretion through different mechanisms. The *Guidelines* have greatly restricted judicial discretion¹²⁷ and channeled prosecutorial discretion. Although the relatively greater restrictions on judges have shifted power to prosecutors,¹²⁸ the overall rigidity of the *Guidelines*

125. See generally Richman, *supra* note 119, at 292.

126. There are Department of Justice policies which should inform these decisions. See David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881 (1996) (arguing that the change in Department of Justice charging *Guidelines* from the more restrictive Thornburgh Memorandum to the more lenient Reno Bluesheet introduced another source of unwarranted disparity). Those directives appear to have little impact beyond their occasional service as post hoc justifications. For a general, if somewhat dated discussion of the problems with developing and enforcing policies to control prosecutorial discretion, see Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

127. See Weinstein, *supra* note 25 (manuscript at 19-25). The reduction in judicial discretion eliminated an important outlet for prosecutorial discretion. To the significant degree that prosecutors influenced judicial sentencing decisions under the old law, they could use that influence to control case outcomes. That option is no longer available.

128. See generally Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, *supra* note 14 (discussing the shift of power

has lessened the ways in which that power can be exercised. Substantial assistance departures have emerged as one of the favorite ways to exercise prosecutorial power. In some districts, the desire to control (and often mitigate)¹²⁹ harsh sentences is the driving force behind extensive use of cooperation.¹³⁰ Cooperation is not, however, the only mechanism for prosecutorial mitigation of harsh sentences. Charge bargaining continues to be an important source of sentence manipulation in some districts.¹³¹ In other districts prosecutors feel less need to mitigate sentences because judges make greater use of their power to depart from the *Guidelines*.¹³² The desire to mitigate sentences is also not universal. Some offices feel a stronger commitment to the mandatory minimums and *Guidelines* and are simply less inclined to mitigate sentences.¹³³ Thus, the opportunity cooperation presents to manipulate sentences is a strong incentive to their use in some, but not all districts.

Despite cooperation's role in maximizing convictions, controlling dockets and its attractiveness to those pro-

from judges to prosecutors occasioned by the sentencing reforms of the 1980s); Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, *supra* note 14 (tracing the expansion of prosecutorial power under the federal *Sentencing Guidelines*); Standen, *supra* note 75, at 1472.

129. Substantial assistance does not always ultimately mitigate the defendant's sentence. It may, for example, be a way for a prosecutor to structure a plea to a very serious charge and give a relatively modest sentence break instead of charge bargaining to a non-mandatory minimum or otherwise more desirable charge.

130. See *infra* pp. 608-11.

131. See Schulhofer & Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines*, *supra* note 47, at 1292 (calling charge bargaining the most important vehicle for *Guideline* evasion).

132. See Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 629 (1998) (comparing, in-depth, the districts of Massachusetts and Connecticut detailing the interplay of actors and factors in shaping local practices and noting that Connecticut prosecutors used substantial assistance departures less than others because their judges departed more for given reasons than other judges).

133. Perhaps in an ideal world we would want a prosecutor's only motivation to be a commitment to the law and the public interest, although that posits a world in which there is only one view on where that commitment would take one. Whatever that world would look like, we live in a world in which that motivation is filtered through the prosecutor's self-interest and general concern about reputation. See Schulhofer, *Criminal Justice Discretion as a Regulatory System*, *supra* note 9, at 62-63.

secutors who wish to control outcomes there are limits to prosecutors' interest in snitches. Perhaps chief among them are the range of problems associated with relying upon criminals whose testimony is motivated by self interest. The ideal cooperating witness would offer complete and truthful information about himself and others. He would be a credible, convincing witness, a skillful and trustworthy undercover operative and from the beginning of his or her cooperation, generally law abiding and honest. Few cooperating witnesses are ideal.

Prosecutors can have problems if the witness is not honest, credible or constant. The three do not go together in any predictable way and the worst cooperator may be one who turns out to be dishonest but credible and changes his or her account over time. Honesty is the most important issue. Above all else, the government must be confident that the cooperator who is assisting in the prosecution of others is telling the truth.

A cooperating witness' credibility is a more complicated matter. If the cooperator testifies before a jury, he or she will come under a vigorous credibility attack, often using the cooperation agreement as the central prop.¹³⁴ The government cannot afford to have the witness appear too motivated to please the government, lest the defense be able to persuade the jury that the testimony is a fabrication, motivated by the desire for sentence mitigation. The cooperating witness must also be constant. The government must be confident that he or she will say the same thing at trial as he or she said in the preparation sessions.

As discussed above, cooperation agreements can be structured to minimize these problems and allocate most of the risks of dishonesty to the defendant. By making the defendant's honesty a term of the agreement and keeping the reward uncertain and contingent these problems can be minimized, but not eliminated.¹³⁵ There will always be de-

134. See Albert J. Krieger, *In Drug Defense, Stress Constitution Jurors Must Recognize a Defense Counsel's Obligation to Uphold All Civil Rights*, NAT'L L.J., Sept. 22, 1997, at C6 (convincing jurors that cooperators have a motive to lie); SUBIN ET AL., *supra* note 24, § 18.9 (presenting an example of a cross examination of a cooperating witness by two different attorneys, one of whom must pursue the theory that self-interest is motivating the snitch to lie).

135. Richman has written about how "making cooperation" is a "leap into uncertainty." See Richman, *supra* note 1, at 94. For the defendant serves the prosecution's interest in maintaining control over him or her between the entry

fendants whose credibility problems are simply too great to consider using them as snitches.

Even among those who are reasonably used as co-operators, there are still risks that cannot be shifted from the government. The use of cooperators always entails the risk that their lies or other misconduct will create problems. Convictions can be reversed,¹³⁶ and in the worst case wrongful convictions occur.¹³⁷

Finally, there are defendants whose crimes are so serious that prosecutors would refuse to mitigate their sentence under any circumstances. At some point the value of climbing the criminal ladder and prosecuting ever more serious criminals diminishes as the most serious wrongdoers are prosecuted.

Prosecutors have strong incentives to seek assistance from defendants who are inclined to offer their help. Although they must weigh certain risks, the law permits them to minimize those dangers by keeping the cooperator uncertain about if and what benefit he or she may receive until after the government has gotten the benefit of its bargain. It is a rare prosecutor who will refuse to even sit down and listen to what a potential snitch has to offer.

II. THE SYSTEMIC IMPACT OF WIDESPREAD COOPERATION

A. *Substantial Assistance and Sentencing Disparity*

The current sentencing regime has spawned a vigorous debate over the relative merits of uniformity and individualization in sentencing.¹³⁸ There may be agreement over

of the plea and the time of sentence.

136. See, e.g., *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991) (reversing convictions growing out of the Wedtech scandal because of cooperator's false testimony about his gambling habit); *United States v. Griffin*, 856 F. Supp. 1293 (N.D. Ill. 1994) (reversing convictions against the notorious El Rukn gang because of outrageous government actions in offering benefits to cooperators and not disclosing them to the defense).

137. See Stephen Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383-86 (1996) (discussing the dangers of perjury by cooperators and offering two examples of cooperator perjury that resulted in wrongful convictions).

138. Much of the commentary has favored greater individualization. See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991) (analyzing the conflicting provisions

the stated Guideline goal of avoiding "unwarranted disparity,"¹³⁹ but the debate swirls around identifying disparity and distinguishing its warranted from its unwarranted cases.¹⁴⁰

Substantial assistance departures create sentencing differences between those who receive them and those who are charged with the same offense and do not benefit from these departures. In some dimensions those differences are unevenly and unreasonably distributed. For example, the rates of substantial assistance departures vary widely from district to district, as do policies regulating cooperation practices and the consistency of the application of those policies within districts. The sentencing impact of these inconsistent practices on sentences actually imposed, how-

and arguing for more individualization); Kevin Cole, *The Federal Sentencing Guidelines: Ten Years Later—The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997) (arguing that the Commission's failure to make fundamental theoretical choices makes the goal of reducing disparity incoherent); Daniel Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992) (analyzing the conflicting provisions and arguing for greater judicial power to individualize); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992) (calling for more individualization within the *Guidelines* system); Stith & Cabranes, *supra* note 39 (explaining that the *Guidelines* are excessively rigid). The *Guidelines* also have their supporters. See Bowman, *supra* note 24 (arguing that the *Guidelines* have struck the right balance and only judges whose power has been curtailed dislike them); O'Sullivan, *supra* note 24 (noting that the *Guidelines* system properly reflects differences in the underlying criminal conduct). The strongest supporters of uniformity have been the courts of appeal. See Reitz, *supra* note 39 (describing how the courts have taken a strongly enforcement oriented approach to the *Guidelines*); Weinstein, *supra* note 25 (manuscript at 54-63) (stating that most circuit courts have favored uniformity over individualization in their analyses of non-substantial assistance downward departures).

139. Specifically, the Commission was directed to consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553 (a) (6) (1996 & Supp. 1998).

140. See Bowman, *supra* note 24, at 714-24 (stating that there is no convincing case for increased disparity under the *Guidelines*); Gerald W. Heany, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991) (arguing that disparity is just as great under the *Guidelines*); Schulhofer & Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines*, *supra* note 47, at 1284 (stating that plea practices under the *Guidelines* lead to some disparity but less than under the old law); Stith & Koh, *supra* note 26, at 287 (stating that sentencing disparity is as great under *Guidelines* as was before).

ever, resists generalization because substantial assistance departures are only one factor in a complex and to some degree self-regulating system.

For example, although cooperation departures constitute the single largest group of downward departures from the *Guidelines*, high cooperation rates do not correlate with lower average sentences.¹⁴¹ The sentencing impact of these differential rates of substantial assistance departures appears to be counterbalanced by other exercises of prosecutorial discretion and judicial discretion. Because substantial assistance is only one aspect of an interdependent web of sentencing decisions, the impact of the differing uses of substantial assistance on the sentences of individual defendants is even more difficult to quantify. Prosecutors and judges inclined to achieve a particular sentencing outcome can get there in a variety of ways. There is evidence, however, that substantial assistance mitigation is meted out to those perceived as the most deserving, rather than the most useful cooperators.

1. *Variations in Substantial Assistance Departure Rates and Policies.* District wide rates of substantial assistance departures vary greatly. There is an almost fivefold difference in cooperation rates between the ten highest and ten lowest cooperation districts. The average cooperation rate for the ten districts with the lowest rates of cooperation is 7.1%.¹⁴² The average cooperation rate for the ten districts with the highest rates of cooperation is 38.1%.¹⁴³ The roughly 10% of all defendants in the 10 lowest cooperation districts had about one-fifth the chance of receiving a substantial assistance downward departure at the time of sentence¹⁴⁴ compared to the 10% of all defendants in the

141. There is no statistically significant correlation between a district's substantial assistance rate and its overall average or median sentences or its average or median narcotics trafficking sentences. These results are discussed *infra* pp. 611-17, and in the Statistical Appendix, *infra* p. 633.

142. There are 4036 total sentences in those districts and 297 total substantial assistance departures cases in those districts. See Statistical Appendix *infra* tbl.1.

143. Actually, the Northern Mariana Islands have a cooperation rate of 85% for 14 cases. However, this is completely atypical so I have excluded that district from my calculation. The districts I used are ranked 84 to 93. There are 3803 cases in those districts and 1485 total substantial assistance departures. Statistical Appendix, *infra* tbl.1.

144. As is thematic throughout this section, local variations in practice and

highest cooperation districts.¹⁴⁵ Although there are wide variations between the top and bottom set of districts, there are also 37 districts whose rates fell in a band above 15% and below 25%.¹⁴⁶

Another way to analyze the inter-district variations is to compare some sets of neighboring jurisdictions.¹⁴⁷ The First Circuit, for example, is quite average with an overall rate of 19.2%, but there is great variation among its districts. New Hampshire had a departure rate of 43% (63 of 145 total cases), while its neighbor Maine, with the same number of prosecutions, had a rate of 19.3%, (28 out of 145 cases).¹⁴⁸ Massachusetts departed for substantial assistance

other factors counsel caution in working with these numbers. The Commission's statistics probably understate the real use of substantial assistance departures. For example, the fifth lowest reported rate of cooperation is in the Eastern District of Virginia, famous for the "rocket docket." Apparently most cooperation in that district is rewarded with a sentence reduction pursuant to FED. R. CRIM. P. 35(b), which permits the government to request a post-sentence reduction for post-sentence cooperation. Although judges in that district will not postpone sentences to permit cooperation to mature, they will ignore the requirement that 35(b) reductions account only for post-sentence cooperation. See Daniel Richman, *The Challenges of Investigating §5K1.1 in Practice*, 11 FED. SENTENCING REP. 75 (1998). These statistics do not include such reductions. If the Eastern District of Virginia is excluded as anomalous (although the practice could be common) and the 11th district (the Western District of Arkansas) were included, the rate is 7.5% (205 out of 3351 cases). Although there are likely other examples of local practices which counsel caution in the use of these numbers, the overall picture still reveals significant disparities.

145. The actual percentage is 9.3% of all sentences (3817 out of 40,879 total sentences imposed). See Statistical Appendix, *infra* tbl.1.

146. Those that ranked 32 to 68 fell within this range. See Statistical Appendix *infra*, tbl.1.

147. I have chosen pairs of neighboring districts as natural experiments, with the underlying notion that contiguous districts might be more fairly compared than others chosen to highlight disparity or uniformity. These comparisons are suggestive, although these districts could be compared in other ways. For example, Connecticut and Massachusetts also share a border and have similar rates. In the *Guidelines* scheme, however, any disparity is troubling, while some consistency proves little.

148. In New Hampshire, 53.5% of narcotics trafficking defendants received substantial assistance departures (46 out of 86) compared to 33.3% (21 out of 63) in Maine. UNITED STATES SENTENCING COMM'N, 1996 FEDERAL SENTENCING STATISTICS BY STATE tbl.9 (1996) [hereinafter 1996 SENT. STATS. BY STATE] (also available at Sentencing Commission home page <<http://www.ussc.gov/judpack/jp1996.htm>> (on file with author and the *Buffalo Law Review*). The mean sentence for drug trafficking in Maine was 61.2 months compared to a mean of 47.9 months in New Hampshire. *Id.* at tbl.7. All district-specific data on lengths of sentences and rates of departures for specific offenses are from these files, which contain federal sentencing data by individual state and

in 25.6% of cases (115 out of 450) and neighboring Rhode Island departed in 4.6% of cases (5 out of 108).¹⁴⁹ Connecticut had a cooperation rate of 10.9%, with a rate of 19.2% for narcotics trafficking (15 out of 78 cases). Neighboring Vermont had an overall substantial assistance departure rate of 25.8% and a rate of 45.5% in narcotics cases (15 out of 33 cases).¹⁵⁰

Districts within states can also show significant variation. The Northern District of Mississippi had an overall substantial assistance rate of 29.4% (45 out of 153 cases), with half the narcotics defendants receiving substantial assistance departures (30 out of 60 cases). The Southern District of Mississippi had an overall rate of 16.3%. In this district, 36.6% of the narcotics defendants received the departures (26 out of 71 cases), but those 26 narcotics trafficking substantial assistance departures were almost 80% of all the departures (26 out of 33 cases).¹⁵¹ In Illinois the three districts ranged from a low of 13.4% for the Southern district to 18.8% for the Northern district to a high of 32.7% for the Central District.¹⁵² Variations are also

district and offer more data than the district summary tables available in the 1996 FED. SENT. SRCBK., *supra* note 2. The national data is found in both sources.

149. Massachusetts' overall rate of substantial assistance departures was 25.6%, with a rate of 37.5% in narcotics trafficking cases (63 out of 168 cases), and an average imprisonment length for narcotics trafficking cases below the averages. The mean sentence length was 64.2 months, compared with a national mean of 86.7 months and the median was 44.5 months, compared with the national median of 60 months. Rhode Island's substantial assistance rate of 4.6% includes a rate of 3.9% in narcotics trafficking cases (2 out of 51 cases) and average imprisonment lengths closer to, but still below the national mean, at 76.5 months, with a median of 60, matching the national median. *See* 1996 SENT. STATS. BY STATE, *supra* note 148, tbls.7 & 9. A comparison of the distribution of case types and other basic data suggests no obvious difference, such as distribution of case types, between Rhode Island and its neighbor that would explain the different rates.

150. Connecticut's drug sentences were quite long, with a mean of 104.8 months and a median of 87 months. Vermont's mean sentence in drug trafficking cases (56.6 months) was below its median sentence, equal to the national median of 60 months. *See id.* at tbl.7.

151. *See id.* at tbl.9.

152. The percentage of substantial assistance departures for narcotics trafficking varied greatly throughout the three districts in Illinois. In the Central District of Illinois Central, 51.8% (59 out of 114) of narcotics defendants received departures. In the Northern District of Illinois, 36.8% (39 out of 106) of narcotics defendants received departures, and in the Southern District of Illinois, 6.8% (17 out of 250) of narcotics defendants received departures. *See id.*

found out West.¹⁵³ In Washington the Eastern District had a substantial assistance departure rate of 4.5% (9 out of 202 cases), while the Western District had a rate of 22% (97 out of 440 cases).¹⁵⁴

Circuit comparisons also reveal wide variation. The Third Circuit had the highest overall substantial assistance departure rate of 35.1%, with the Eastern District of Pennsylvania mitigating 47.5% of its sentences on that basis.¹⁵⁵ At the other end of the spectrum are the Ninth and Tenth Circuits, with respective averages of 11.3% and 14%.¹⁵⁶

As might be expected from the varying rates of substantial assistance departures, policies governing cooperation vary from district to district and are not consistently applied within many districts. The anecdotal evidence collected by commentators¹⁵⁷ is supported by a Sentencing Commission study on substantial assistance which examined review processes within U.S. Attorneys' offices. Data compiled through a mail survey, telephone survey and review of randomly selected case files¹⁵⁸ indicates that less than half the districts complied consistently with their own

The average sentences also varied throughout the districts. In the Central District of Illinois, the mean sentence for narcotics trafficking was 98 months compared with 119.7 months in the Northern District and 109.5 months in the Southern District. *Id.*

153. Although the four California Districts were all low cooperation districts, in the Central District 6.9% of defendants received departures compared to 8.8% in the Eastern District, 12.2% in the Northern District and 9.5% in the Southern District. *See* 1996 FED. SENT. SRCBK., *supra* note 2, at 43 tbl.26.

154. *Id.*

155. The number of sentences mitigated are 388 out of 817 total. Although 67.3% of the narcotics trafficking defendants received substantial assistance departures, the median drug sentence length matched the national mean of 60%, and the median was only 6 months shorter, 80.6 months compared to 86.7 months. The average percentage of defendants receiving substantial assistance departures in the Middle District of Pennsylvania was 37.3%, compared to 20.2% in the Western District of Pennsylvania, 30.9% in New Jersey, 15% in Delaware, and 14.3% in the Virgin Islands. *See* 1996 SENT. STATS. BY STATE, *supra* note 148, at tbls.7& 9.

156. *See* 1996 FED. SENT. SRCBK., *supra* note 2, at 43 tbl.26.

157. *See* Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, *supra* note 14, at 124-28 (discussing mechanisms and policies in several different districts); Saris, *supra* note 52, at 1045, 1048 (noting differing policies on whether or not to recommend specific sentences and differing policies on when to make the motion).

158. *See* SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at 6-7 (describing methodology).

review policies, about one quarter complied in some cases and one quarter consistently did not comply.¹⁵⁹ The Commission's report also compared the kinds of activities different prosecutors would consider for a substantial assistance motion. There was wide agreement that testifying against others, participating in the investigation and giving information assisting in the prosecution of others, as well as providing information about the wrongdoing of others, would be considered in evaluating whether to make a 5K1.1 motion.¹⁶⁰ In 8% of the districts, however, information about others who were not prosecuted was deemed insufficient and in one district only testimony under oath was deemed adequate for consideration of substantial assistance motion.¹⁶¹ There was wide divergence on the question of whether information about the defendant's own activities would be considered. Almost half the responding districts said it would be considered,¹⁶² despite the plain language requiring that the assistance be in the investigation or prosecution of another person.¹⁶³

Thus far, the picture of significant variations in prac-

159. The lowest rate of complete consistency, 44.4%, was for the 36 districts that reported that the U.S. Attorney, him or herself, reviewed the decision, while the highest rate, 63.2%, was for districts that had review or approval by an Assistant U.S. Attorney. The highest rate of inconsistency, 41.2% was in districts that had a review committee. SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at 8 exh.3.

160. Although not every district would consider each activity worthy of the same reward. *See* Saris, *supra* note 52, at 1045-46.

161. Eighty-eight districts responded to the mail survey. All 88 noted that they would consider testimony under oath; 87 would consider participation in the investigation of another and information in the prosecution of others. Eighty-one would consider information about the criminal activity of others and 43 would consider information about the defendant's own activities. SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at exh.4.

162. *Id.* There is one potentially significant ambiguity in this section of the report. Although it clearly notes that most prosecutors thought those who testified should receive a motion, it goes to say some "used self-incriminating information in considering substantial assistance." *Id.* at 9 exh.4. Although the report treats both as answering the question of whether the one activity alone was enough for a motion, if the question was posed as the report suggests, some prosecutors may have been indicating that they would consider self-incriminating information as one factor so that a defendant who gave information about others and self-incriminatory information freely might do better than one who only gave information about others. *Id.*

163. The explicit statutory and *Guideline* language specifies that the assistance be in the "investigation or prosecution of another." 18 U.S.C. § 3553(e) (1994); U.S.S.G. § 5K1.1.

tices is quite clear. Different districts handle cooperators in different ways. But it is difficult to draw clear conclusions about the effects of those differences. The Commission study also reports wide variations in whether a given activity will result in a motion from the prosecutor for a downward departure. This part of the report makes the important claim that similarly situated cooperators can receive very different benefits, but is not completely convincing.

The section of the study relies upon analysis of data from a random selection of narcotics conspiracy cases.¹⁶⁴ An astonishing 67.5% of all the defendants provided some kind of assistance to the government.¹⁶⁵ About half that group, or 38.6% of the total group, received the benefit of a substantial assistance motion.¹⁶⁶ The type of cooperation that resulted in a motion varied. While all four of the defendants who did undercover work for the government received a motion, and eight of the ten defendants who testified or provided tangible evidence received a motion,¹⁶⁷ sixty-two of the eighty-six (68.8%) defendants who gave verbal information/agreed to testify did not receive the motion.¹⁶⁸ Eleven of the sixteen who only agreed to testify did not receive the motion and twenty-two of the forty-two who gave verbal information only did not receive the motion.¹⁶⁹

Although the data suggests that similarly situated defendants received different treatment, the study properly cautions that these broad categorizations of defendants may lump together those who provided substantial and truthful cooperation with those who did not. In particular, some of the defendants who gave information and agreed to testify

164. See SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at 10 n.21 (describing this aspect of the study).

165. All § 5K1.1 recipients were assumed to have provided assistance but only those non-section 5K1.1 recipients whose files had actual documentation of assistance were counted as having attempted to cooperate. Those who provided assistance not reflected in the case file and did not receive the motion were not counted, making the 67.5% figure a conservative lower bound estimate. See SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at exh.5 n.21.

166. *Id.*

167. See *id.* The data does not indicate whether the two who testified or provided tangible evidence but did not receive the motion violated their agreement in some fashion and so did not receive the benefit for that reason.

168. See *id.*

169. See *id.*

may simply not have had substantial assistance to offer.¹⁷⁰ There are likely defendants who provide equally valuable assistance but receive different benefits, but as the Commission notes, that problem requires more study before its precise dimensions are understood.

2. *The Impact of Variations in Rates and Policies on District-Wide Sentencing.* By one measure, the impact of a substantial assistance departure upon an individual defendant's sentence is dramatic. The average difference between cooperation and non-cooperation sentences in narcotics trafficking cases is more than five years and as the sentences grow, so do the reductions.¹⁷¹ Obviously substantial assistance departures reduce sentences. But all defendants who do not receive substantial assistance departures do not end up with harsher sentences than those who do. A defendant's sentence can be mitigated in other ways. The prosecutor may choose to offer a lenient plea bargain,¹⁷² manipulate the sentence calculations through sentence factor bargaining¹⁷³ or by omission of relevant conduct¹⁷⁴ or agree not to oppose a defendant's motion for a non-substantial assistance downward departure.

Each district reaches its own equilibrium in the use of these devices, influenced by the attitudes and interaction of the bench and U.S. Attorney's Office and the districts

170. *Id.* at 11. In addition, some defendants lose eligibility for § 5K1.1 motions by committing new offenses, lying or otherwise breaking their agreement with the government.

171. See SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at Exh.11.

172. See Schulhofer & Nagel, *supra* note 47, at 1292 (concluding that charging and bargaining undercut the *Guidelines*).

173. See, e.g., *United States v. Gonzalez-Bello*, 10 F. Supp.2d 232 (E.D.N.Y. 1998) (discussing sentence factor bargaining over Guideline level adjustments).

174. The *Guidelines* sentence is supposed to reflect all of a defendant's "relevant conduct." See U.S.S.G., *supra* note 3, at §1B1.3 (listing, among other things, instances of similar misconduct which may go beyond those charged and conduct carried out by a co-defendant or co-conspirator if it was reasonably foreseeable). If a defendant is charged with narcotics trafficking, the *Guideline* sentence may be increased to reflect narcotics dealt by co-conspirators or transactions other than those charged in the indictment. See *generally* *Edwards v. United States*, 118 S. Ct. 1475 (1998) (concluding that judge determines whether conduct is part of same course of conduct); Paul M. Secunda, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1275 (1997) (discussing how relevant conduct rules may be used by prosecutors to exercise discretion).

historical sentencing patterns.¹⁷⁵ For example, districts tend to mitigate sentences with either substantial assistance departures or other downward departures, but not both. Nationally there is a statistically significant negative correlation¹⁷⁶ between rates of substantial assistance and other downward departures. This pattern tends to mitigate some of the sentencing disparity that would otherwise flow from the wide variations in substantial assistance rates. When judges are generous with mitigation, prosecutors scale back and when prosecutors are free with substantial assistance departures, judges make less use of their discretion to mitigate using other factors.¹⁷⁷

There are still other ways districts can regulate sentencing. The defendant who is not offered a cooperation deal in a low cooperation district may enjoy the offsetting benefit of a charge reduction or a judicial departure on other grounds. Defendants who receive departures in high cooperation districts may find the benefit lower than average if the government chooses to tie its generous departure policy with specific and modest requests for the magnitude of the departure¹⁷⁸ or judges limit the departures on their own.¹⁷⁹ These mechanisms can blunt the sentencing impact of variations in local practices upon individual de-

175. See Michael Gelacek et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 361 (1996) (finding that those districts that were relatively lenient before the *Guidelines* remain relatively lenient).

176. There is a statistically significant negative correlation ($r = -0.27$ ($p < 0.01$)) between substantial assistance and other downward departures. See Statistical Appendix, *infra* tbl.2.

177. See Farabee, *supra* note 132, at 596 (supporting the interpretation of the nationwide pattern by a case study which compares Connecticut, a low substantial assistance but high other departure district, with Massachusetts, a low other departure but high substantial assistance district; Massachusetts typifies the first and Connecticut the second).

178. See, e.g., *United States v. Wallace*, 114 F.3d 652 (7th Cir. 1997) (detailing a fact pattern where government recommended three level downward departure for cooperation and judge only departed one level); *United States v. Jimenez*, 992 F.2d 131 (7th Cir. 1993) (specifying an agreement that the government would recommend a 25% departure). See generally Saris, *supra* note 52, at 1046-49 (determining magnitude of departure by variations in prosecutorial and judicial practices).

179. Although it is only one anecdote, the judicial attitude is captured in *United States v. Garcia*, 1997 U.S. App. LEXIS 30633 (6th Cir. 1997) (affirming as within his discretion the district judge's refusal to depart because so many cases involve § 5K1.1 motions; therefore the instant case was not unusual).

fendants within a given district.

Analysis of district-wide sentencing patterns shows that sentencing practices within a district tend to even out overall sentences within that district as compared to other districts. The most important finding in evaluating cooperation is that despite the significant variations in substantial assistance rates, there is no statistically significant correlation between those rates and the average overall lengths of sentences of imprisonment or the average lengths of narcotics trafficking sentences in a given district.¹⁸⁰ In other words, one cannot generally say that high cooperation districts are, as a group, more or less lenient in their overall sentencing than low cooperation districts. Districts in which judges tend to give more non-substantial assistance departures do, however, tend to have lower overall sentences and lower narcotics sentences.¹⁸¹

There are several possible explanations for the fact that overall sentence lengths do not correlate with substantial assistance departures but do correlate with the rate of other downward departures. The rate of other downward departures may be the purest indicator of judicial sentencing attitudes. If they do not use that device very much, they may be generally inclined to longer sentences, even in cooperation cases.¹⁸² Another possibility is that prosecutors who do not make very many substantial assistance motions may even out sentences through the use of other discretionary devices, while judges have no other device for mitigation. A third possibility is that high cooperation districts achieve the same average sentence through a distribution of very high and very low sentences, while low cooperation districts have more sentences in the middle.¹⁸³

180. The only significant correlation was that both the mean and median for fraud sentences increased as substantial assistance increased. Otherwise there was no correlation. See Statistical Appendix, *infra* tbl.2. This and other district wide sentencing numbers only compare district wide results and do not reveal any information about the actual distribution of the individual sentences in the district.

181. There is a statistically significant correlation between the rate of other downward departures and the mean for all sentences ($r = 0.34$ ($p < 0.01$)), the median for all sentences ($r = 0.25$ ($p < 0.05$)), the mean for all narcotics trafficking sentences and the median for all narcotics trafficking sentences ($r = 0.33$ ($p < 0.01$)). See Statistical Appendix, *infra* tbl.2.

182. Although this runs counter to the intuition that "harsh" or law enforcement oriented judges tend to reward cooperators highly.

183. This distribution would suggest that those against whom cooperators

Given the wide variations on practices, there are likely examples of each pattern and combinations of patterns.

3. *The Distribution of Substantial Assistance Motions-Who Gets the Benefit?* This discussion of the sentencing impact of differences in the use of substantial assistance departures has focused on patterns that tend to even out sentencing differences among groups of defendants. That analysis should not obscure the dramatic impact the decision to make or refuse to make a substantial assistance motion can have upon a particular defendant's sentence. For some the impact may be mitigated by other charging or sentencing decisions, but for others, particularly defendants in districts that rely upon substantial assistance as a primary tool for mitigation, the impact can be tremendous. Thus, the reasons the motion is made or not made also deserve attention although prosecutors' motivations are very difficult to uncover.¹⁸⁴

The Sentencing Commission's study on substantial assistance departures concludes that the decision to make or refuse to make the motion does not reflect the actual value of the cooperation in many cases. Rather, the study concludes that the rate of substantial assistance motions correlates with gender and race,¹⁸⁵ but not with the value of the information, and it provides evidence that prosecutors use substantial assistance to mitigate sentences for less culpable defendants.

The study examined the much discussed "cooperation paradox," which suggests that higher level defendants will be better able to trade upon their supposedly more valuable information to receive lower sentences through cooperation than their less culpable, but less well informed under-

provide assistance receive longer sentences balancing out the mitigated sentences of the snitches.

184. The Commission has recommended that prosecutors be required to file a statement of reasons for their motions to permit better study of this area. SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at 21.

185. Women, non-minority defendants, U.S. citizens, defendants with high school educations and younger defendants all showed a higher statistically significant probability of receiving the departure than their paired counterparts. SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at 19 exh.9. Except for age, all those factors also correlated with longer departures of from 9% for women to 2% for high school graduates. Age correlated negatively with the magnitude of the departure. *Id.* at exh.12.

lings.¹⁸⁶ The study first compared the level of the conspirator to the kind of assistance he or she provided to the government. The study concluded that higher level conspirators such as organizers, importers and middle level dealers of drugs are no more likely to work undercover or otherwise provide the highest quality kinds of assistance than street level dealers or the lowest level of conspirators comprised of couriers, renters/storers and users. If higher level participants do get more or better mitigation through cooperation, it does not appear to be because they are able to offer undercover or other more valuable assistance at a higher rate than others.¹⁸⁷

The study next tested the assumption that defendants who are conspiracy leaders do better in the cooperation marketplace because their superior access to information¹⁸⁸ enables them to achieve better results for the government than their less well informed underlings. Through case file reviews and interviews with prosecutors, the Commission concluded that cooperation from high, middle and low level defendants was about equally likely to result in guilty pleas, new prosecutions, new convictions and other benefits to the government.¹⁸⁹

Finally, the study looked at the correlation between the defendant's role and the likelihood of receiving a downward departure motion from the government. Using a six position hierarchy, the study found that the lowest level participant, the so called "passive participants" who acted as "renters or storers of equipment" were around twice as likely to get substantial assistance motions as the more culpable high and middle level co-defendants.¹⁹⁰

The Commission's data suggests that all defendants, regardless of role, have an equal chance of providing particular kinds of cooperation and gaining particular kinds

186. See Oliss, *supra* note 12, at 1858 (stating that lower level defendants will end up with higher sentences than their more culpable and better informed supervisors); Schulhofer, *supra* note 29, at 212 (same); but see Bruce H. Kobayashi, *Deterrence with Multiple Defendants: An Explanation for "Unfair" Plea Bargains*, 23 RAND J. ECON. 507 (1992) (arguing that overall deterrence is maximized because increase in penalties for subordinates outweighs reduction in other sentences); Richman, *supra* note 1, at 80 n.49 (discussing inverted sentencing and citing two judicial expressions of concern).

187. See SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at 11 exh.6.

188. This assumption is theoretically problematic. See *infra* p. 61.

189. See SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at exh.7.

190. *Id.* at 13.

of benefits for the government. Less culpable defendants appear more likely to be rewarded by the government.

The study suggests that these patterns reveal that prosecutorial rewards for cooperation do not correlate to the value of the cooperation to the government. Although the results are suggestive and provocative, they need to be used cautiously.

The assumed link between the role and the value of the defendant's information is not all that clear. Defendants at the highest levels of a conspiracy may actually have little useful information for the government. They can insulate themselves from much of the illegal activity and may only have information about more culpable players outside the country or otherwise so well insulated that their cooperation is of no practical value. Low level defendants, on the other hand, are less able to insulate themselves from risky activities and may acquire much valuable information in the course of their many meetings, deliveries, sales or other illegal activities. In many instances low level defendants may be more valuable sources and present as more credible witnesses than higher level defendants. Although the Commission's study found a clever and suggestive surrogate for the value of the cooperator's information in measuring his or her role in the conspiracy, its conclusion that more study of this question would be useful is well grounded. The exact relationship between the value¹⁹¹ of the cooperation and the reward to the cooperator remains uncertain.

Holding the question of the actual value of the cooperation aside, the conclusion that low level defendants in this study were likely to do the same things as their high level counterparts and get the same kinds of results for the government but were much more likely to gain a benefit from the prosecution for their cooperation is an important one. Although low level defendants, as a group, possess more valuable information than the 'cooperation paradox' assumes, it appears very unlikely that their information is so much more valuable as to explain their higher rates of

191. Valuing cooperation presents very difficult questions. What are the relative merits of a cooperator whose testimony is sufficient to convict a mid-level player and cooperator who provides intelligence, but little or no admissible testimony against a high level criminal? Should we factor in the break to the cooperator and determine that mitigation of low-level defendant's sentence to convict a mid-level player results in greater overall value than mitigation of a mid-level defendant's sentence to convict the same criminal?

substantial assistance downward departures. The picture that emerges from the data and the anecdotes (albeit a surprisingly impressionistic one given the wealth of readily available data on federal sentencing) is that in the current overactive market in cooperation, prosecutors use cooperation to achieve docket control and influence case outcomes to achieve particular results in individual cases, as well as to further law enforcement goals. The widespread variation in rates, both nationally and between some pairs of arguably comparable districts suggests that at least some of the cooperation is either not achieving, or not motivated by the scope of, its law enforcement impact. All prosecutors want to make good cases. If extensive use of cooperation were driven by its value as a law enforcement tool, we might expect that rates would even out between neighboring districts and nationally.

The tendency of cooperation rates to fit into a larger pattern within each district that evens out the ultimate sentencing impact of substantial assistance departures in the district wide sentencing picture also suggests decisions driven by forces other than law enforcement concerns. This is particularly true given the strong negative correlation between substantial assistance and other downward departures. Prosecutors in districts with judges who readily mitigate sentences for other reasons do not have different law enforcement goals from their colleagues in other districts, but they do have different sentencing concerns.

Do federal prosecutors need very high rates of cooperation to achieve their law enforcement goals? Federal prosecutors enjoy a very high ratio of crimes to the time they have to prosecute them.¹⁹² Assuming they want to optimize their crime fighting, they should choose strategies that improve their efficiency, allowing them to prosecute more cases,¹⁹³ or strategies that result in prosecuting better cases¹⁹⁴ in the time they have available. It is not obvious

192. This "crime to time ratio" is of central importance in understanding how prosecutors allocate resources. Stuntz, *supra* note 120, at 24 ("the effects of the crime to time ratio . . . almost certainly dwarf the effects of variations in legal doctrine on both the number of charges filed and conviction rates").

193. This assumes that courts could handle more cases. Although cooperating defendants may assist prosecutors to speed some cases, in many districts crowded court dockets are more likely limiting factors on the number of cases that are prosecuted and the speed with which they are handled.

194. A case might be better if it involves more serious violators, more

that high rates of cooperation achieve either goal.¹⁹⁵

The evidence suggests that prosecutors in the current cooperation market are motivated by a combination of law enforcement concerns and prosecutorial desires to individualize sentences. In that market there are sentencing differences among some individuals and differences in the way particular sentences are achieved, even if the overall sentences do not vary that greatly among districts. Are those sentencing differences warranted or unwarranted disparities?

Those who equate fairness with uniformity¹⁹⁶ will no

serious violations, averts more harm or has a greater deterrent effect than would the prosecution of the case to which it is compared.

195. First there are cooperators who give information about their own cases. The revelation of cooperators might be assumed to persuade some co-defendants to plead guilty. Although the rate of pleas has risen slightly, and some low cooperation districts have relatively higher trial rates, that may be explained as the result of defendants not being induced to plead guilty with cooperation deals, rather than a lack of persuasive evidence to induce pleas in non-cooperating defendants. Cooperation does have that effect in some cases, but there is no obvious evidence that it has resulted in appreciably higher plea rates, particularly comparing some high and low cooperation districts. In many narcotics cases the evidence is already strong and defendants choose to go to trial because the sentence is so high, even on a plea, that they have little incentive to spare government resources.

Other cooperators have evidence about other individuals not yet arrested in that same case or who have committed other crimes. Should those cases be pursued without comparison against the vast pool of other unprosecuted cases? Cooperation requires resources that are not being directed toward the prosecution of another case. The problem for federal prosecutors is not the detection of crime, it is the selection of crime.

Finally cooperation might result in higher quality cases. Perhaps cooperators are in the best position to give information on the next level up in the organization, and so on. If this were generally true, the high district to district variations would be more surprising, unless it turned out that districts with low rates of departures are gaining most of the benefits without paying much for cooperation by not making the motion in most cases. For a defendant facing a very long sentence after either a regular plea or a trial, a small chance at significant mitigation may be adequate inducement, especially if it is the same small chance everyone else gets.

The question is whether widespread cooperation alone is better than other techniques such as undercover work and confidential informants along with more judicious use of cooperators.

196. The Sentencing Commission and some of the courts of appeal are among the strongest proponents of uniformity through their strict adherence to the *Guidelines* sentencing structure. See Reitz, *supra* note 39, at 1465-66 (explaining that many of the appellate courts have taken a high enforcement/low creativity approach to the *Guidelines*); Stith & Cabranes, *supra* note 39, at 1272-74 (criticizing the Commission's refusal to share

doubt observe that prosecutorial dissatisfaction with being forced to adhere to the mandatory minimums and the *Sentencing Guidelines* are not legitimate grounds for mitigation but merely a source of unwarranted disparity. That criticism has more force in view of the fact that although sentencing excesses tend to be counterbalanced in the big picture, there remain individual examples of clearly unwarranted disparity because of inconsistent applications of policies and sentencing rules both within and between districts.

Many of those who advocate that sentencing should be individualized might respond that most of these departures are warranted.¹⁹⁷ After all, prosecutorial discretion has long and legitimately been exercised to moderate the potentially harsh and unjust operation of criminal statutes that overcriminalize. Although there is a legitimate reading of the *Guidelines* that stresses individualization,¹⁹⁸ that argument takes it too far. The mandatory minimums were intended to treat this specific class of criminals uniformly and harshly. It is hard to argue that the statute was not intended to apply to some of these defendants, as we might argue in the typical overcriminalization context. In addition, the prosecutorial role in mitigation is traditionally exercised through charging decisions, not quasi-misrepresentations to the sentencing court.¹⁹⁹

interpretive authority); Weinstein, *supra* note 25 (manuscript at 19-31) (distinguishing the uniformity and individualization approaches to the *Guidelines*).

197. Among the staunchest advocates for individualized sentencing are the Supreme Court as illustrated by its decision in *Koon v. United States*, 518 U.S. 81, 116 (1996) and the Second Circuit. See Weinstein, *supra* note 25 (manuscript at 48-54) and other commentators, *supra* note 138 (offering examples of the rhetoric of individualized sentencing).

198. This is exemplified by *Koon*, 518 U.S. at 116. See *supra* note 41 and accompanying text.

199. At least one court has expressed that view. "The desire to dictate the length of a defendant's sentence for reasons other than his or her substantial assistance is not a permissible basis for exercising the government's power under § 3553(e)." *United States v. Stockdall*, 45 F.3d 1257, 1261 (8th Cir. 1995). However, another judge, in the role of commentator, urged that cooperation departures be used to avoid "ultra-uniformity" early in the development of *Guideline* sentencing. Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combating Ultra-Uniformity*, 35 B.C. L. REV. 799 (1994) (discussing areas of flexibility in the developing substantial assistance area). Another court has argued that sentence factor bargaining, by contrast, is properly viewed in the tradition of charging decisions as legitimate

At bottom, widespread cooperation motivated by the desire to control sentence outcomes must be recognized as unwarranted disparity within the current regime, even by those who favor its results. Although the disparities are not nearly as troubling as they would be if the widely varying rates of cooperation resulted in widely disparate overall sentences, the overactive market in cooperation is a great source of dishonesty and evasion and a still uncertain amount of unwarranted disparities among individual defendants.

B. *The Threat to the Adversary System*

Even were cooperation more evenly distributed and less often used to evade mandatory minimums and *Guidelines* sentencing, the damage to the adversary system from having 20% of all defendants ally themselves with the prosecutor (and many more try) would still merit our attention. Cooperation strips away what little remains of the adversary system in the vast majority of criminal cases resolved by a guilty plea. It further marginalizes and often eliminates the defense lawyer. It places a premium upon the development of a personal bond between the defendant and the prosecutor and investigators which is antithetical to adversary justice.²⁰⁰

Prototypical adversarial criminal justice, in which the opposing lawyers battle over every disputable issue in a case is a rationed commodity. Institutional defenders can only afford to pursue that resource-demanding work in a small percentage of their typically heavy caseload.²⁰¹ In the vast majority of cases that are resolved with a plea there is

exercises of prosecutorial discretion. See *United States v. Gonzalez-Bello*, 10 F. Supp.2d 232, 237 (E.D.N.Y. 1998) (calling the *Guidelines* ambivalent on such bargaining and arguing that it should be expressly permitted).

200. Gleeson, *supra* note 2, at 452-55 (explaining how prosecutors come to feel compassion for cooperating witnesses and reward them more than their agreements might require).

201. Stuntz argues that the notion that institutional defenders are just case-processors has been largely rejected to account for evidence that the adversarial role conception persists and controls the few cases that appear to merit the investment in resources. Stuntz, *supra* note 113, at 41 n.145 (citing ROGER A. HANSON ET AL., NATIONAL CTR. FOR STATE COURTS, INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL 66-69 (1992); LISA J. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 46-49, 148-50 (1987)).

little that can fairly be called adversarial. Many have noted that the prosecutor and defense lawyer are often united in their pursuit of efficient docket control above all else.²⁰² In many dimensions defense lawyers, particularly institutional defenders, have closer and more significant relationships with prosecutors than with their clients and trade upon those relationships to make deals, sometimes at the expense of their clients. Negotiated pleas can even involve collusion between the prosecution and defense. They may minimize a defendant's conduct to fit within a prosecuting office's policy, or agree not to disclose information to the probation office or to the court.

But cooperation strips away what little is left of the adversarial process in that vast majority of cases by simply cutting the defense lawyer out of the process and putting the prosecutor and the defendant on the same team. The snitches' primary goal is not to enforce a legal right or even gain a discretionary benefit from the neutral judicial officer, but to win the favor of the person who has prosecuted him or her. The vast field of discretion upon which cooperation takes place makes it essential to win the prosecutor's favor. The prosecutor must want to pursue the cooperation in the early stages,²⁰³ and as sentencing approaches mere grudging

202. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 582-83 (1986-87) (studying the failure of appointed criminal defense lawyers to engage in substantive motion practice and concluding they were primarily case-processors interested in efficient disposition of cases). Regardless of whether Mirsky and McConville are correct in generalizing their conclusions to all defenders and cases, it seems likely that most institutional defenders have different goals (and a different role conception informing their work) for the majority of cases they triage as losers.

203. I once represented an older man charged with committing immigration fraud by entering into several sham marriages with women who then used the marriages to regularize their immigration status. It was an early *Guidelines* case and although their enforcement was still fluid, my client faced the possibility of a prison sentence of 12 to 18 months. He decided to try to cooperate. Our first meeting began rather poorly, with the prosecutor seeming uninterested in his information against the women involved and rather badly disposed toward his acts of bigamy. After a time my client asked the prosecutor if she would mind if he removed his false teeth, as they were causing him some discomfort. She smiled and assured that he should make himself comfortable. As my client removed his teeth, the prosecutor and I exchanged smiles and the meeting took a friendlier turn. He entered into an agreement and received probation. Although I will never know, I have always thought of that as the turning point of the case—the moment my client became an old man whose false teeth hurt, instead of, or in addition to being a criminal to that prosecutor.

approval of the defendant's efforts will not win the extraordinary benefits for which most defendants hope.

The mechanics of cooperation provide ample opportunity for the two to get to know each other. Indeed, cooperation has changed the expectations about how prosecutors and defendants should relate to each other. In cooperation the two talk directly after the defendant has been charged with a crime. That is itself a significant departure from a system in which once a lawyer is appointed, prosecutors only see the defendants they are prosecuting in court, in the presence of the judge. Every defendant who wants to cooperate must sit with the prosecutor, waive his fifth amendment right and reveal inculpatory information.²⁰⁴ Before the modern era of cooperation, federal prosecutors did not expect to talk with most of the people they prosecuted, and their lawyers,²⁰⁵ in a setting in which client and lawyer had made a calculated decision to try to please the government.

Predicating the resolution of the case upon the development of a personal relationship has repercussions for all the players and the system. The role of the defense attorney is turned inside out. He or she has an incentive to move away from the client and become a cheerleader for the prosecution. Lawyers representing snitches can get good results by distancing themselves from their clients over the course of the representation in order to foster closer relationships among the defendant, prosecutor and investigating agents.²⁰⁶ At the same time the defense lawyer has an incentive to strengthen his or her own relationship with the

Although it may not have been her conscious thought, perhaps it was then that she decided to become his advocate for sentence mitigation.

204. This meeting occurs while the defendant usually has minimal legal protection. See *supra* notes 80 & 85.

205. See *United States v. Ming He*, 94 F.3d 782, 793-95 (2d Cir. 1996) (discussing the role of defense counsel in opinion invoking supervisory power to prevent cooperating witnesses' statements made without counsel in a cooperation debriefing session from being used to negatively evaluate cooperator's assistance); Gleeson, *supra* note 2, at 442 (criticizing the use of supervisory power in *United States v. Hammond*, 858 F.2d 834 (2d Cir. 1988) and offering an alternative view of the defense lawyer's role in cooperation cases).

206. Gleeson, *supra* note 2, at 450-53 (discussing how defense attorneys may limit their attendance at meetings to avoid the possibility of becoming witnesses themselves but more fundamentally because they regard the prosecutor as the client's ally).

prosecutor. After all, the cooperator remains the uncertain thrall of the prosecutor during the extended pendency of the case. It is common for some tension to develop between cooperator and prosecutor as time goes on,²⁰⁷ and a good relationship between defense lawyer and prosecutor can go a long way to smoothing over the inevitable conflicts. The snitch's lawyer knows that the big payoff is not in the enforceable aspects of the plea agreement but in the unenforceable but all powerful discretionary choices the prosecutor makes about what signals to send the sentencing judge.

The tension many defense lawyers feel in representing snitches has led some to argue that representing snitches is simply incompatible with zealous representation.²⁰⁸ Absolute refusal to represent cooperators is impossible for most institutional federal defenders and would deny many clients their best opportunity for significant mitigation. When a small part of the lawyer's overall caseload is cooperation, the tension can be managed. Criminal lawyers are accustomed to making deals with prosecutors and although cooperation is different in kind from the ordinary plea, the defense lawyer, particularly the institutional defender, is accustomed to these role tensions. The danger is that the system has become one sided in some places. What happens when everyone ends up on the same side? Many defense attorneys fade from the picture as cooperation progresses, attending fewer meetings and encouraging the development of the relationships among prosecutor, agents and the defendant that will ensure the most helpful exercise of the prosecutor's discretion. The defense runs the obvious risk of losing its will to fight, whether because everyone has become so friendly or because it is not worth endangering

207. Prosecutors must explore the defendant's prior bad acts and other sensitive areas to properly evaluate the cooperation, meet disclosure obligations and prepare for cross examination. See *Brady v. Maryland*, 373 U.S. 83, 84-86 (1963) (holding that government's failure to disclose exculpatory evidence requires reversal); *Giglio v. United States*, 405 U.S. 150 (1972) (explaining that the government's failure to disclose promise of leniency to cooperator is a violation of the defendant's due process rights). These discussions are just one source of tension in a relationship between two people who would typically be very unlikely to choose each other's company if each had the choice.

208. Taylor-Thompson, *supra* note 114, at 2457 (discussing the decision of the highly regarded District of Columbia Public Defender Service not to represent any cooperators); Richman, *supra* note 1, at 116-17 (giving examples of lawyer's ideological resistance to cooperation).

the relationships that benefit most cases to fight for one or two clients. That classic institutional defender pressure is heightened by cooperation because it is so corrosive of the standard role behavior.

Prosecutors face the danger of losing the distance that encourages both fairness and a perception of fairness. It is only natural for a prosecutor who has spent many hours meeting with a cooperator and learned a great deal about his or her life to develop some personal feeling for him or her.²⁰⁹ After all, the cooperator has helped the prosecutor gain a professional success and the two have shared the intense experience of a trial together. Without overstating the case or suggesting that most prosecutors cannot maintain the opposing ideas of cooperator as criminal and helpful witness there is still a personal element that corrodes objectivity. As for the defense lawyer, this is a matter of degree. What may be an acceptable cost in a few cases to gain the benefit of important convictions can become an unacceptable price when it is paid in many cases for smaller benefits.

In addition to the damage to the roles of the defense and prosecution, there is the danger inherent in lessening the adversarial oversight on already powerful federal prosecutors. In cases involving litigated issues or even guilty pleas involving substantive negotiation, all aspects of the government's case are scrutinized by the defense, which has an incentive to raise all investigative and legal errors. Once the decision is made to try to gain a substantial assistance departure, the government's errors are of no interest to the defense. In fact the defense will often come to share the prosecution's interest in hiding or minimizing problems because the best result for the cooperator flow from the prosecution getting its best result. When everyone finds themselves on the same side, no one has an interest in uncovering mistakes.

C. *Government Endorsement of Morally Ambiguous Behavior*

Snitching is morally problematic. Although our distrust of tattling runs quite deep, we also recognize that informing

209. Gleeson, *supra* note 2, at 454 (arguing that prosecutors have a propensity to favor cooperators even if they may not deserve it).

on others can be a duty²¹⁰ and even a virtue.²¹¹ On which side does cooperation in federal cases fall? If our criminal justice system is encouraging many defendants to violate one social norm to mitigate the punishment for transgressing another, that is a problem worthy of our concern.

First, there is the tattling problem. Whether it is the "ethic of the schoolyard or the large family,"²¹² there is a widely held aversion to reporting the misdeeds of others. There are countervailing social norms, like the legal obligation to report a crime or a lawyer's duty to inform the authorities of the misdeeds of others,²¹³ but those obligations have inspired much lively debate²¹⁴ and little compliance.

One source of our reluctance to report others is the high value we place on loyalty. It is one thing to call the police on a stranger and quite another to inform on an associate or family member.²¹⁵ George Fletcher has argued that loyalty, the recognition that some relationships are special and entitled to greater deference than others, is central to our concept of justice. Loyalty gives us an identification with others from which our desire for a common good springs. The desire for a common good leads to a sense of fairness within the group which generalizes to the idea of justice.²¹⁶

Loyalty, however, is not an abstraction for Fletcher, but a product of our particular human constitution. In his view loyalty is not a matter of choice, but circumstance. We are constituted to feel loyalty to our particular community and do not, as a matter of fact, identify ourselves with all of

210. 18 U.S.C. § 4 (1998).

211. Richman, *supra* note 1, at 83 (discussing the glorification of McCarthy era cooperators).

212. *Id.*

213. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1983) (requiring lawyers to report violations of the Code to the relevant authority); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1995) (same).

214. See generally Cynthia L. Gendry, *Ethics—An Attorney's Duty to Report the Professional Misconduct of Co-Workers*, 18 S. ILL. U. L.J. 603, 606-15 (1994) (arguing that deterrents to reporting the misconduct of lawyers in one's own law firm are particularly strong); Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491 (1986) (stating that the duty to report ignores the moral status of informing and is unenforceably vague and over-inclusive).

215. The Unabomber case offers the contemporary hard case. Even in the face of the ongoing murders of innocent people, many questioned the morality of a brother turning in a brother.

216. GEORGE P. FLETCHER, *LOYALTY* 20-21 (1993).

humanity, only smaller units.²¹⁷ We do not choose those to whom we owe loyalty, rather our loyalties reflect the "duties of the historical self."²¹⁸ Although his argument runs more toward duties of political loyalty to nation states, it captures the common feeling that our special duties to some people do not flow from choice but rather from circumstance. We accord them special status in the expectation that they will reciprocate and we will all benefit.

Even if Fletcher has captured something about why we feel and strongly respect some obligations solely because of our historical relationships, does that justify recognition and respect for loyalty to comrades in crime? This question explains why we initially feel disgust for snitching in the criminal context but appears to offer analysis that could free us from that feeling. We could react from our general respect for loyalty but come to recognize that this is a kind of loyalty that does not further legitimate interests and should not be respected. There is a grain of truth to that observation, but the argument throws the baby out with the bath water.

We may feel aversion to the act of tattling, even when the bad act deserves exposure, because we appreciate the virtue of the loyalty itself, apart from the worthiness of its object. The criminal does a wrong in committing a crime. He does a separate wrong in his act of disloyalty to others with whom he had a special relationship deserving of loyalty. We may fault the judgment that brought him into a relationship of trust with wrongdoers, but his conduct in that relationship is properly subject to separate evaluation. The argument that the relationship that pursues illegal ends deserves no loyalty fails to separate out the illegality from the relationship. In fact we can respect the loyalty, smartness or honesty of a wrongdoer even as we condemn the wrongdoing.

Still, there is that nagging grain of truth that there is something problematic about valuing loyalty in this context. After all, if some acts of disloyalty can be excused or even become heroic when motivated by a greater good, shouldn't we think about the cooperator as performing a good act, or at least making amends, when he or she ex-

217. *Id.* at 17-21. There has to be some other relationship against which the special relationship can be measured.

218. *Id.* at 18.

poses the wrongdoing of another? We can try, but that is a very difficult story to tell about the federal criminal cooperator who seeks a substantial assistance downward departure.²¹⁹ After all, he or she is motivated by a desire for a personal benefit, not some greater good.

In the end, the personal benefits conferred on cooperators may be sufficient explanation for the almost universal disdain. Our strong mistrust for those who inform on others for their own benefit has several strands. Perhaps most important is that we have a hard time ascribing selfless motives to the informer who gains a personal benefit. We do not and should not believe he or she acts out of good motives. Finally, we mistrust the informer who seeks benefits because we fear the powerful motivation to lie.²²⁰ The criminal defendant considering cooperation risks scorn for those reasons and also appears an irresponsible coward. The prospective cooperator is so afraid of the punishment he or she has brought on him or herself as to choose to commit an act of disloyalty and bring suffering to others.

The government should be more cautious than it is about encouraging disloyalty.²²¹ First we might wonder about the moral lesson we teach individual cooperators. Apparently two wrongs can gain an advantage, even if they do not make a right. We should also question the impact of very high levels of cooperation in some districts upon the systemic values they model. When most defendants are selling themselves and their punishment will be determined

219. The people most likely to tell that story are judges, *United States v. Ming He*, 94 F.3d 782 (lauding the cooperator's contrition) and prosecutors, Gleeson, *supra* note 2, at 453 (stating that most prosecutors have a far more favorable view of accomplice witnesses stemming from a combination of valuing their contrition and the prosecutor's own desire to "make cases").

220. More theoretically, if Fletcher is right about the roots of loyalty, then seeking personal benefit is the most basic betrayal of the sense of common good that flows from according some relationships special deference. If one must disadvantage a member of the group at least one should forego weakening the group further by increasing the inequity through advantaging oneself—if the group is one whose cohesion we wish to encourage. Disloyalty that threatens the efficacy of the criminal group is the very thing for which substantial assistance departures provide an incentive. The question is whether, or perhaps how much of that social utility strikes the right balance against our moral ambivalence.

221. Fletcher's argument provides a strong basis for this concern by placing loyalty at the core of our civic virtues.

by how well they satisfy their former adversary, trust and loyalty become scarce commodities. People become only means to further other goals and cease being treated as independent agents, responsible for their own actions.

The government has compelling reasons for rewarding some cooperation despite our strong moral ambivalence about it. From the prosecutor's point of view any moral taint that may flow from encouraging others to engage in a problematic act is counterbalanced by his or her selfless and laudable desire to punish wrongdoing and benefit society.²²² But as cooperation increases in frequency the justifications weaken. At the current levels of cooperation the government is seriously undermining the fundamental value of loyalty.²²³

III. SOLUTIONS

The solution to the problems that attend the excessive use of cooperation is to decrease it by lowering supply, demand or both. In the current system, cooperation is simply too attractive to all the players in the system, and they generally gain these advantages at little or no personal cost. Cooperation's significant costs in sentencing inequity, damage to the adversarial system and governmental en-

222. This positive spin on the morality of the government's use of cooperators is not universally shared. Three judges in the United States Court of Appeals for the Tenth Circuit reversed the judgment of the district court and ordered suppression of a cooperator's testimony because, the panel ruled, the government committed criminal bribery, in violation of 18 U.S.C. § 201(c) (2), by promising leniency in exchange for cooperation. *See United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). Labeling the government's routine conduct in one-fifth of the federal criminal prosecutions criminal is a fundamental attack on the morality of the practice. The panel's decision was vacated when the Tenth Circuit granted en banc review on its own motion. *See id.* at 1361. The Circuit affirmed the district court, rejecting the panel's opinion and holding that the long history of rewarding cooperators with leniency, stretching back to common law, puts this conduct outside of the reach of the bribery statute. *United States v. Singleton*, No. 97-3178, 1999 WL6469, at *1 (10th Cir. Jan. 8, 1999) (en banc).

223. The modern example of a society overrun by government endorsed snitching was the former East Germany. The extraordinary revelation of the huge numbers of neighbors, colleagues and friends reporting on each other to a massive security bureaucracy should give us pause. Although there is no comparison between that experience and the current use of cooperators in federal law enforcement, we might well reflect on how pervasive we think snitching should be.

couragement of morally problematic behavior are almost entirely externalized and offer no check upon the buyers and sellers.

There are several different kinds of solutions to the overuse of cooperation. One commonly recommended but flawed approach is direct (non-incentive based) regulation of prosecutorial discretion through guidelines, statutes or other rule based restrictions on charge and sentencing bargaining. Another approach is to lower the supply of cooperators by reducing sentences, thus decreasing defendants' incentives to become snitches. A third approach, the most narrowly tailored and optimal one, would be to decrease the demand for cooperation by limiting the number of cooperators that each United States Attorney's Office may reward, in effect imposing a price on what is now a virtually free commodity.

A number of proposals have been made for direct regulation of prosecutorial discretion in sentencing. Some proposals suggest non-binding guidelines or review procedures to influence prosecutorial decisions in substantial assistance cases and make them more consistent.²²⁴ Although these tend to be low risk ideas, experience strongly suggests that the incentives and pressures in the current regime are too powerful to be much influenced by guidelines and other voluntary mechanisms. Many U.S. Attorney's Offices already ignore the *Guidelines* and review procedures that they have.

Another approach would be legislative changes in the scope or kind of discretion exercised in substantial assistance cases. This approach could involve crafting a uniform and judicially reviewable set of rights and obligations for prosecutors and cooperating defendants, establishing a mandatory schedule of sentence reductions tied to particular kinds of cooperation to the *Sentencing Guidelines* or changing the allocation of discretion between judge and

224. See Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, *supra* note 14, at 245 (identifying nationwide prosecutorial *Guidelines* as the most promising reform); Saris, *supra* note 52, at 1050 (suggesting that the Department of Justice should develop and publish principled justifications for prosecutorial discretion in substantial assistance cases); SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at 22 (recommending that prosecutors be required to file a statement of reasons for their motions to permit development of more systematic approaches).

prosecutor.²²⁵

There are two problems with efforts to create enforceable limits on discretion. First, our experience with the *Guidelines* illustrates the hazards of writing detailed rules to govern formerly discretionary decisions.²²⁶ The more we rigidify the system, the less able it is to account for individual cases and the greater the pressure to manipulate the rules. The answer to manipulation resulting from overly detailed rules is not more detailed rules.

More fundamentally, enforceable standards governing cooperation deals misapprehend the importance of prosecutorial discretion in cooperation cases and in our criminal justice system as a whole. Prosecutorial discretion is the key structural device for allocating the scarce resource of criminal prosecution, not just a policy judgment about the relative merits of assigning power to different players.²²⁷ We should be very cautious about additional rules designed to directly regulate these complex decisions, especially in the cooperation arena. Plea agreements play a role in allocating criminal justice resources, and cooperation deals often involve particularly potent resource allocation choices. Decisions about cooperation deals effect the allocation of resources in both the cooperator's case and in whatever other cases are resolved, pursued or dropped because of the snitch. Decisions about whether and how to resolve a group of cases, and all the resource allocation and fairness questions that go into such decisions, are particularly ill-suited to general proscriptions. They are choices that require contextualized decision-making using the prosecutor's expertise.

Prosecutorial discretion is also crucial to achieving some individualization of justice in our system. The legislature must draft broad criminal statutes to protect society against unforeseen or unpredictable harm (the problem of

225. See Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, *supra* note 14, at 177 (asserting that judges, not prosecutors, should have the ultimate authority to determine who does and does not receive a substantial assistance departure); SENT. COMM. SUBST. ASS. STUDY, *supra* note 58, at 21 (suggesting that a choice be made between regulating departure magnitude on an absolute or proportional basis).

226. See Stith & Cabranes, *supra* note 39, at 1281 (discussing the dangers of rigidity and micro management).

227. See Stuntz, *supra* note 113, at 22-26 (asserting that prosecutors determine how scarce enforcement resources are allocated).

overcriminalization). Prosecutors choose among the large pool of potential defendants who fall under those broad statutes to maximize the benefit of limited law enforcement resources and achieve individualized justice.²²⁸ Legislative efforts to control the power to select what cases to prosecute and how to charge them will either increase inequities or manipulation, or more likely increase both. Assume efforts are made to draft rules regarding what kind of plea offers prosecutors may make to cooperators and what kind of sentencing benefits they will receive. If the legislature drafts with sufficient specificity to avoid overcriminalization and decrease the risk of inequitable results, it will create the kind of detailed, rigid rules that encourage manipulation. Detailed rules invite finer and finer distinctions to vent the inevitable pressure prosecutors feel to fine tune results to individual cases. If the rules are sufficiently well written to discourage manipulation, they may simply encourage prosecutors to circumvent them by choosing to prosecute other classes of cases. If, on the other hand, the legislature drafts more broadly, prosecutors will either be forced to accept inequities or engage in manipulation to achieve the individual fairness at which prosecutorial discretion aims.²²⁹ Prosecutors' decisions about what cases to bring and how to charge and resolve those cases turn upon a host of competing, interdependent considerations. They involve choices that are quite hard to regulate directly.²³⁰

A more effective answer to the problem of excessive

228. See Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, *supra* note 14, at 160 (asserting that prosecutorial discretion is an integral part of a system in which the legislature typically over-criminalizes and over-punishes).

229. These considerations only apply to legislative efforts to control charging decisions. Attempts to directly regulate the relationship between cooperators and prosecutors face other problems, particularly the risk of compromising the prosecutor's current ability to control cooperators by deferring benefits and forcing them to accept most of the risks of their misbehavior.

230. One commentator has convincingly argued that the best way to control discretion is to disperse it rather than regulate it. Thus, the antidote for the excessive concentration of power that has arguably resulted from the reduction in judicial discretion at the same time as prosecutorial discretion has been increased is to disperse sentencing power by restoring judicial sentencing discretion. See Standen, *supra* note 75, at 1531-37 (calling for a return of judicial sentencing discretion to disperse and so counterbalance the power now concentrated in the prosecutor).

cooperation would be to decrease the pressure that defendants feel to cooperate. The most effective and most widely advocated reform along these lines would be the elimination of statutory mandatory minimum sentences. Commentators and the Sentencing Commission have powerfully argued that the mandatory minimums are inconsistent with and undermine the Guideline structure.²³¹ Mandatory sentences also put defendants beyond the reach of the mitigation permitted within the *Guidelines*²³² and the possibility of other kinds of mitigation would decrease the incentive to cooperate that defendants facing those sentences now feel.

The call to eliminate the mandatory minimums is one of the few sentencing reform ideas that unites most commentators and the Sentencing Commission. It may be that the only people who are unconvinced are legislators and the people who vote for them.²³³ Politicians would have a very hard time defending themselves against attacks that they are soft on crime should they suggest eliminating mandatory minimum sentencing.²³⁴

If a politically acceptable way were found to reduce defendants' incentives to cooperate, the supply of cooperators would decline. Fewer cooperators would lead to less cooperation and therefore less disparity, less damage to the adversary system and less cooperation about which to feel moral ambivalence. A supply-side reduction in cooperation, however, would not lead to the optimal reduction in disparity. Defendants would not sort themselves by their own law enforcement value. They would continue to be motivated to cooperate by the length of their sentences, regardless of their value to the government. Given that

231. See *supra* note 29 (discussing the conflicts between the *Guidelines* and mandatory minimums).

232. Mitigation includes any non-substantial assistance downward departures and downward adjustments under the *Guidelines* that would take the sentence below the statutory punishment. Mandatory minimum sentences are also criticized for shifting power to prosecutors by making sentencing subject to charging decisions.

233. See Yellen, *supra* note 27, at 585-90 (explaining that political pressures create harsher sentencing regimes). Even so, some who support harshness in sentencing recognize the problems with mandatory minimums. See Hatch, *supra* note 29, at 192-97 (recognizing problems with mandatory minimums but concluding that the legislature's ultimate responsibility is to restore the voters' confidence in the criminal justice system).

234. See generally Weich, *supra* note 33 (opposing mandatory minimum sentences in Congress is politically unpopular but good policy).

prosecutors have incentives to accept cooperators for purposes other than law enforcement, we might expect a smaller number of the same mix of cooperators, a sub-optimal result.

The problem of excessive cooperation would best be solved by encouraging prosecutors to better use their discretion in the selection of cooperators. That could be done by limiting the number of substantial assistance departure motions each district is permitted to make to a fixed percentage of the total number of sentences imposed in that district. Although more careful statistical analysis might be useful,²³⁵ this analysis suggests that districts should be limited to making substantial assistance motions in about 15% of the cases, a rate lower than the current national average and a significant reduction for many districts. Given that one-third of all districts have rates in that range,²³⁶ that appears to be level of cooperation that is unlikely to much restrict law enforcement and will probably permit its use in almost all cases in which it has significant law enforcement value.²³⁷

Imposing a limit on substantial assistance motions would force prosecutors to evaluate each decision to use cooperation against other possible instances of cooperation. They would use their knowledge and judgment to make bet-

235. It would be useful to determine if there is any relationship between rates of substantial assistance and any indicators of law enforcement efficiency or success, such as convictions per prosecutor or crime rates. Although clear relationships seem unlikely in such a complicated system, these relationships should be explored.

236. There are 31 districts that report cooperation rates at 15% and below. See Statistical Appendix, *infra* tbl.1.

237. Some will be concerned about limiting useful law enforcement oriented cooperation. I have argued that differential rates in neighboring districts and other evidence suggests that much of the cooperation is of marginal or no benefit to achieving crime control goals. The unpersuaded may at least agree that the differences in rates show that if there is a great deal of useful cooperation in all districts, prosecutors have a variety of mechanisms for encouraging its use. Cooperation involving information but not testimony raises fewer issues about keeping defendants honest through uncertainty during an extended period of time and some of that cooperation might be expected to be rewarded with charge and sentence bargaining. Indeed, that kind of evasion is to be expected, given the degree of evasion and manipulation that characterizes the *Guidelines*. A strict limit on substantial assistance departures would not equal a strict limit on snitching. Even so, limited evasion is not worrisome because the goal is to encourage fewer, more carefully chosen instances of cooperation overall, not to strictly control or monitor each choice.

ter, more strategic choices about cooperation and maximize its law enforcement benefits. To the extent some prosecutors continued to use cooperation for the purpose of sentence manipulation, at least the overall incidence of manipulation would decrease and it would be more likely to be limited to egregious cases.

Limiting the supply of a particular prosecutorial tool is an unusual proposal. We do not impose numerical limits on prosecutors' supplies of any other investigative tools. Cooperation, however, is such a prosecutorial bargain in the current regime and its effects are so problematic that we should consider this limitation. Perhaps the idea might seem less odd if we recognize that other investigative tools whose overuse would be very problematic are better regulated by the marketplace. For example, wiretapping and physical surveillance are two very invasive law enforcement tools to which there are relatively few legal barriers.²³⁸ The real restraints against the disastrous over-use of those tools is that they are very time demanding. Wiretaps must be monitored and surveillance requires constant human attention. There are, however, no similar restraints on the escalating use of cooperation.

An arbitrary limit on the number of cooperation departures would surely have the same effect as other such limits on discretion—it would cause other kinds of circumvention to increase. Federal sentencing is like a balloon. The *Guidelines* are intended to keep it round, but there are pockets of pressure that distort the shape. Every time we push in one place, the balloon swells in another. We are wisely unwilling to build a completely rigid structure, yet there remains uncertainty about how to relieve the pressure for individualization.

I have advocated a particular kind of increased rigidity because the problems associated with sentence mitigation through substantial assistance departures are greater than the benefits. Substantial assistance should be limited to op-

238. Federal law permits the government to seek authority for wiretaps that "may provide" evidence of a very wide array of crimes, 18 U.S.C. § 2516 (1994 & West Supp. 1998), and law enforcement officers "may see what may be seen 'from a public vantage point where [they have] a right to be.'" *Florida v. Riley*, 488 U.S. 445, 449 (1989) (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (holding that warrantless helicopter observation of marijuana plants not observable by ground observation from outside of home does not violate Fourth Amendment)).

timize its law enforcement role and minimize its use for sentence manipulation. There remains the fundamental problem of the widespread (but hardly universal) perception that a significant group of defendants is punished too harshly. The answers to that problem lie in reducing penalties and fostering a return to reliance on the traditional avenues for using prosecutorial discretion to achieve individual justice. Prosecutors should rely on charge and plea bargaining to achieve justice in particular cases instead of turning every defendant into a snitch.

Statistical Appendix

This appendix contains two tables. Table 1 contains univariate descriptive statistics and Table 2 offers bivariate correlations for district-level sentencing data.¹

Table 1, selected univariate descriptive statistics, includes two different sets of data. The columns indicating total sentences imposed and rates of within Guideline and downward departure sentences (columns 2-5) include all the sentences imposed.² The descriptive statistics for the mean and the median length of sentences where imprisonment was imposed (columns 6-9) only include those sentences in which imprisonment was imposed.³

1. All data used in this statistical analysis is from 1996 FED. SENT. SRCBK, *supra* note 2, tbls.13 & 26 and 1996 FED. SENT. STAT. tbl.9 (for each district). Table 1 of this statistical appendix, which follows, is essentially a reformatting of selected FY 1996 Sentencing Commission statistics. The notation "n/a" indicates data that was unavailable at the time the statistical analysis was performed but may have since become available. All numbers were accurate as of July 1998

2. Rates of upward departure are not included in this table, but account for 0.9% of all sentences. 1996 FED. SENT. SRCBK., *supra* note 2, tbl.26.

3. The absence of data on the lengths of individual sentences within the district significantly limits what can be inferred about the distribution of individual sentences within a particular district. For example, the numerical difference between the mean and the median indicates the direction of skew for the distribution of sentences within a district, but the magnitude of that skewness cannot be determined from these two measures.

Statistical inferences about individuals (in this case individual sentences) cannot be based on the examination of aggregate measures (i.e., a mean or median for an entire district). See EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 92 (7th ed. 1995). There are two levels of analysis: individual sentences within a district and the districts themselves. Making inferences about the individual sentences within a district based on characteristics of the district as a whole can lead to erroneous conclusions. Since there is tremendous variation in the magnitudes of individual sentences and in the total number of sentences within each district, averaging the means (medians) across districts will not result in the mean (median) value across all sentences.

Table 1: Selected Univariate Descriptive 1996 Sentencing Statistics for All Districts
(Districts ordered from lowest to highest rate of substantial assistance departures)

Dist.	# Sent FY 96	% Sent w/in Gdls	% Sent Subst Ass Deprts	% Sent Other Dwn Deprts	Overall Sent Mean Mnths	Overall Sent Median Mnths	Narc Trffick Sent Mean Mnths	Narc Trffick Sent Median Mnths	# Narc Trffick Sents	District Rank by % Subst Ass Deprts
NATL	40,879	69.6	19.2	10.3	62.3	33	86.7	60	15,358	
OKE	68	91.2	4.4	4.4	79.5	60	97	63	20	1
WAE	202	79.7	4.5	15.8	37.2	21	68.3	59.5	54	2
RI	108	83.3	4.6	8.3	62.1	40.5	76.5	60	51	3
CAC	955	87.2	6.9	5.2	54.8	30	111.5	87	231	4
VAE	803	89.8	7.2	2.4	77.2	33	135.6	105	279	5
NM	614	64.3	7.5	27.4	40.2	21	47.3	30	241	6
OKW	191	88	7.8	2.1	64.4	30	134.1	96.5	44	7
WVS	241	85.9	8.3	5	75.4	46	110.1	81.5	110	8
OKN	175	84.6	8.6	6.9	57.9	31.5	110.8	66.5	36	9

Dist.	# Sent FY 96	% Sent w/in Gdls	% Sent Subst Ass Deprts	% Sent Other Dwn Deprts	Overall Sent Mean Mnths	Overall Sent Median Mnths	Narc Trffick Sent Mean Mnths	Narc Trffick Sent Median Mnths	# Narc Trffick Sents	District Rank by % Subst Ass Deprts
CAE	679	80.7	8.8	10	60.2	24	130.2	120	117	10
ARW	118	86.4	9.3	2.5	50.1	33	78.5	70	38	11
CAS	2047	58.3	9.5	31.1	32.4	24	46.7	30	614	12
SD	314	81.8	9.6	6.7	37.7	21	47.1	28.5	40	13
KYW	323	83.9	9.9	3.7	48.6	21	93.2	60	57	14
UT	229	74.2	10	14.8	57.3	46	47	39	48	15
WVN	150	86	10	4	72.8	37	91.4	50	81	16
ARE	251	86.8	10	3.2	51.9	24	58.9	46	93	17
AZ	1314	44.4	10.4	44	33.6	18	40.7	21	433	18
AK	84	71.4	10.7	16.7	53.2	37	77.9	60	23	19
CT	258	58.1	10.8	29.1	84.3	51	104.8	87	75	20
TXE	520	83.1	10.8	4.8	81.9	49	95.6	70	253	21
PR	586	83.4	11.1	5.1	83.8	46	90.6	57	294	22

Dist.	# Sent FY 96	% Sent w/in Gdls	% Sent Subst Ass Deprts	% Sent Other Dwn Deprts	Overall Sent Mean Mnths	Overall Sent Median Mnths	Narc Trffick Sent Mean Mnths	Narc Trffick Sent Median Mnths	# Narc Trffick Sents	District Rank by % Subst Ass Deprts
CAN	532	71	12.2	16.2	n/a	n/a	85	57	101	23
OR	503	76.5	12.3	10.1	48.6	24	65.8	60	135	24
FLS	1552	81.6	12.8	4.7	84.2	57	101.2	63	953	25
ILS	352	82.4	13.4	3.1	95.6	63	109.5	84	249	26
DC	371	72.2	13.5	5.9	65.1	36	95	70	111	27
WIE	251	81.7	13.6	4	70.8	48	101.9	80	72	28
LAW	231	77.1	14.3	6.1	51.1	24	88.8	67.5	46	29
VI	91	81.3	14.3	4.4	36.2	18	65.6	58.5	28	30
DE	93	83.9	15	1.1	45.6	24	47.9	27	16	31
MT	185	70.8	15.1	13.5	54.9	30	71.1	34	65	32
WIW	99	78.8	15.2	2	65.7	39	96.7	70.5	40	33
KS	280	77.1	15.4	6.1	61.5	54	80.9	70	96	34
GAN	610	73	15.7	9	75.6	46	104.6	84	185	35

Dist.	# Sent FY 96	% Sent w/in Gdls	% Sent Subst Ass Deprts	% Sent Other Dwn Deprts	Overall Sent Mean Mnths	Overall Sent Median Mnths	Narc Trffick Sent Mean Mnths	Narc Trffick Sent Median Mnths	# Narc Trffick Sents	District Rank by % Subst Ass Deprts
NV	362	75.7	15.8	8	58.4	37	98.3	70.5	80	36
HI	292	78.8	16.1	4.8	58.4	44	82.8	70	98	37
MSS	202	75.2	16.3	7.9	64.5	43	101.7	65.5	64	38
INS	215	76.7	16.3	6	68	30	104.2	71.5	56	39
NYS	1130	72	16.4	10.9	58.7	36	68.9	51.5	368	40
LAE	393	76.8	16.5	5.8	59.6	37	83.7	63	152	41
TXW	1904	65.9	16.7	16.1	41.8	24	61.2	42	760	42
KYE	306	80.1	16.7	2.9	40.8	24	46.6	30	122	43
NYW	347	72	17.3	10.1	37.7	24	50.2	37	100	44
GUAM	81	75.3	17.3	6.2	68.3	24	138.2	84	24	45
INN	248	77	18.6	4	57.7	37	85.8	60	64	46
TNW	338	76.6	18.6	3.8	74.5	36	109.6	87	105	47
ILN	589	72.3	18.8	7.6	57.7	30	119.7	73.5	110	48

Dist.	# Sent FY 96	% Sent w/in Gdls	% Sent Subst Ass Deprts	% Sent Other Dwn Deprts	Overall Sent Mean Mnths	Overall Sent Median Mnths	Narc Trffick Sent Mean Mnths	Narc Trffick Sent Median Mnths	# Narc Trffick Sents	District Rank by % Subst Ass Deprts
TNM	127	75.6	18.9	3.9	75.8	33.5	122.9	64	45	49
ME	145	75.2	19.3	4.8	61	33	61.2	46	63	50
GAM	250	75.6	19.6	4	93.3	49.5	118.5	107.5	76	51
OHN	544	72.8	19.7	7.5	50.1	30	87.7	70	159	52
TXS	2058	70.5	19.9	8.8	51.5	32	69	46	1029	53
MD	356	68.8	19.9	11	99.3	63	137.2	92	119	54
PAW	273	70	20.2	9.2	62	37	89.6	70	95	55
NYE	1175	59.9	20.8	18.8	53.2	30	49.9	33	598	56
ALM	148	77.7	21	1.4	77.7	46	105.9	87	71	57
IAS	219	69	21	9.1	80.6	60	93.9	70	137	58
SC	704	76.7	21.3	1.7	68.6	45	81.5	60	321	59
GAS	184	65.8	21.7	7.1	82.8	56	119.2	96	77	60
WAW	440	63.2	22	14.3	53.6	30	68.4	60	151	61

Dist.	# Sent FY 96	% Sent w/in Gdls	% Sent Subst Ass Deprts	% Sent Other Dwn Deprts	Overall Sent Mean Mnths	Overall Sent Median Mnths	Narc Trffick Sent Mean Mnths	Narc Trffick Sent Median Mnths	# Narc Trffick Sents	District Rank by % Subst Ass Deprts
MIW	304	74.3	22.4	3	58.6	33	79.7	60	128	62
ND	159	65.4	22.6	10.7	21	12	50.6	32	28	63
VAW	313	71.6	23.6	4.2	72.6	42	97.2	73.5	134	64
TXN	972	69.2	23.6	6.1	71.2	41	111.7	85	275	65
ALN	362	68.5	24.3	6.6	79.3	46	134.4	90.5	92	66
MIE	797	67.6	24.6	7	57.4	30	82.9	60	323	67
NCM	367	72.5	24.8	1.9	n/a	n/a	n/a	n/a	n/a	68
WY	100	70	25	4	48.5	37	57.7	46	42	69
IAN	164	65.8	25	8.5	69.3	48	94.2	84	89	70
NCE	521	68.7	25.3	5	128.9	96.5	168.7	144	280	71
MA	450	61.8	25.6	11.8	57.7	37	64.2	44.5	146	72
VT	93	52.7	25.8	19.4	45.5	30	56.6	60	30	73
MOE	446	69.3	26	3.8	86	57	105.6	70	212	74

Dist.	# Sent FY 96	% Sent w/in Gdls	% Sent Subst Ass Deprts	% Sent Other Dwn Deprts	Overall Sent Mean Mnths	Overall Sent Median Mnths	Narc Trffick Sent Mean Mnths	Narc Trffick Sent Median Mnths	# Narc Trffick Sents	District Rank by % Subst Ass Deprts
ID	94	67	26.6	6.4	60.8	36	123.8	108	23	75
LAM	82	68.3	26.8	1.2	71.9	36	117	98.5	30	76
NYN	430	59.1	28.2	11.9	30.1	15	52.7	30	134	77
MN	286	58.4	28.3	12.2	59.1	30	86.3	58.5	102	78
FLM	1116	63.7	28.4	7.1	90.3	57	112.5	72	505	79
MSN	154	62.3	29.2	5.8	80.6	59	104.6	60	59	80
TNE	338	67.2	30.2	1.2	73.6	46	78.4	60	141	81
CO	380	59	30.5	9.5	55.2	34	76.1	54	131	82
NJ	724	62.7	30.9	5.2	49.9	33	69.4	57	193	83
FLN	322	62.7	32	4.4	128.1	86.5	153.6	120	192	84
ALS	374	63.6	32.6	2.9	86.4	57	108.9	75	204	85
ILC	248	62.1	32.7	2.8	72.6	46	98	84	110	86
NE	260	58.8	35	5.8	59.4	37	82.7	60	122	87

Dist.	# Sent FY 96	% Sent w/in Gdls	% Sent Subst Ass Deprts	% Sent Other Dwn Deprts	Overall Sent Mean Mnths	Overall Sent Median Mnths	Narc Trffick Sent Mean Mnths	Narc Trffick Sent Median Mnths	# Narc Trffick Sents	District Rank by % Subst Ass Deprts
PAM	359	55.2	37.3	7.2	56.6	30	77	57	100	88
OHS	365	58.4	37.8	3	69	33	91.9	60	128	89
MOW	395	57.2	38.2	2.8	73.4	37	92.7	60	169	90
NCW	518	53.3	41.3	3.9	93.4	62	110	82	293	91
NH	145	51	43.4	4.1	41.6	24	47.9	30	84	92
PAE	817	47.6	47.5	3.9	78.5	48	80.6	60	305	93
NMIS	14	7.1	85.7	0	30.3	25.5	31.4	24	11	94

Table 2¹ provides the Pearson product-moment correlation coefficient² (r), or simply the correlation coefficient, which measures the strength and the direction of the statistical association between two variables. Correlation coefficients can vary from -1 to 1, with values close to -1 or 1 indicating strong correlation and values near 0 indicating weak correlation. Positive coefficients indicate that high (low) values of one variable are associated with high (low) values of the other variable, whereas negative coefficients indicate that high (low) values of one variable are associated with low (high) values of the other variable.

When correlation coefficients are calculated for two variables, an observed significance level, or p-value (p), indicates the probability of finding a false positive. It is most common to use a p-value 0.05 or less as the criterion to determine statistical significance, and p-values of 0.05-0.10 to indicate marginal significance. A p-value of 0.05 means that there is a 5% chance of a false positive association, p-values of 0.10 and 0.01 indicate a 10% and a 1% respective chance of a false positive association.

The key for Table 2 appears on the page following the table.

1. This statistical analysis was performed by Mr. Greg Drevenstedt, a graduate student in demography and sociology at the University of Pennsylvania.

2. The Pearson product-moment correlation coefficient is calculated using standardized scores for each variable, which are the deviations of each observation from the mean divided by the variable's standard deviation. Dividing by the standard deviation of each variable removes the unit of measurement that each measurement is based on, hence the term *scaleless*. Using standard deviation units makes it easier to quantify the statistical association between two variables with different units of measurement.

Table 2. Pearson Product-Moment Correlations for Variables from Sentencing Data for FY 1996

Variable	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.
All Sentences Imposed													
A.	-0.12	0.14	-0.10	0.39**	-0.16	-0.08	-0.06	-0.13	-0.16	0.19+	0.12	-0.06	-0.08
B.		-0.99**	-0.83**	-0.30**	-0.39**	0.13	0.02	0.29**	0.26*	-0.26*	-0.28**	0.17	0.31**
C.			0.82**	0.33**	0.31**	-0.14	-0.02	-0.30**	-0.27*	0.24*	0.25*	-0.21+	-0.31**
D.				-0.27**	0.37**	0.06	0.13	-0.09	-0.07	0.30**	0.40**	-0.05	-0.15
E.					-0.09	-0.34**	-0.25*	-0.36**	-0.33**	-0.09	-0.23*	-0.24*	-0.24*
F.						-0.01	0.04	-0.02	0.02	0.36**	0.52**	-0.003	-0.07
Length of All Sentences where Imprisonment was Imposed													
G.							0.91**	0.80**	0.74**	0.08	0.18+	0.47**	0.31**
H.								0.61**	0.60**	0.11	0.22*	0.35**	0.26*
I.									0.92**	0.02	0.11	0.35**	0.25*
J.										0.04	0.11	0.36**	0.26*
K.											0.82**	-0.12	-0.07
L.												0.01	0.01
M.													0.75**

+ p<0.10; * p<0.05; **p<0.01.

Variables Key

- A. Number of Sentences
- B. Proportion within Guidelines
- C. Proportion Downward Departure
- D. Proportion Subst. Asst. Departure
- E. Proportion Other Downward Departure
- F. Proportion Upward Departure
- G. All Sentences: Mean
- H. All Sentences: Median
- I. Drug Trafficking: Mean
- J. Drug Trafficking: Median
- K. Fraud: Mean
- L. Fraud: Median
- M. Robbery: Mean
- N. Robbery: Median